

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition To Review And Set Aside And On
Request To Enforce An Order Of
The National Labor Relations Board

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 14 1962

Joseph W. Stewart

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

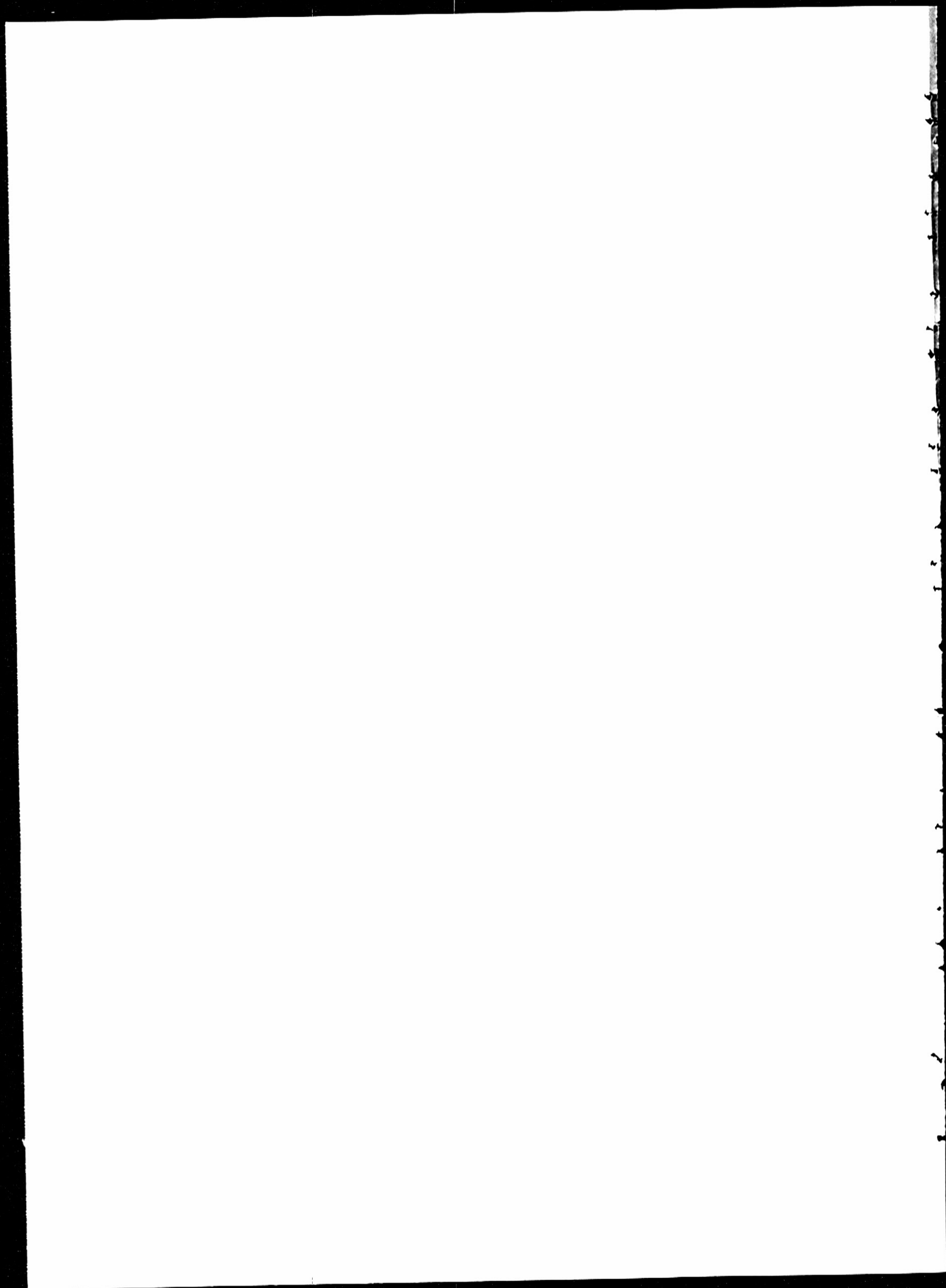
On Petition To Review And Set Aside And On
Request To Enforce An Order of
The National Labor Relations Board

JOINT APPENDIX

(i)

INDEX

	<u>Page</u>
Prehearing Conference Stipulation, Filed April 25, 1962	1
Order Approving Prehearing Conference Stipulation, Filed April 25, 1962	3
Decision and Order of the National Labor Relations Board, D-2431 -- 134 NLRB No. 138, dated Dec. 19, 1961	4
Stipulation of Record Approved February 6, 1961	16
Amendment to Stipulation of Record, Approved July 27, 1961	20
Excerpts from Standard Automotive Agreement	23



JOINT APPENDIX

[Filed April 25, 1962]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUITDISTRICT NO. 9, INTERNATIONAL ASSOCIATION)
OF MACHINISTS, AFL-CIO,)

Petitioner,)

v.)

No. 16,901

NATIONAL LABOR RELATIONS BOARD,)

Respondent.)

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court hereby stipulate as follows with respect to the issues, the procedure, and the dates for the filing of the briefs and joint appendix herein.

I. The Issues

A collective bargaining agreement contains the provision that: "Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists." The National Labor Relations Board found that this provision was prohibited by section 8(e) of the National Labor Relations Act, as amended, and that, by "reaffirming, maintaining, and giving effect to" the provision after the effective date of section 8(e), petitioner and an employer association did "enter into" the provision within the meaning of section 8(e) subsequent to its effective date. Two questions are presented:

1. Whether the provision was entered into within the meaning of section 8(e) subsequent to its effective date.
2. Whether the provision is prohibited by section 8(e).

II. The Joint Appendix

A. The portions of the record to be printed shall be embodied in a Joint Appendix. The printed Joint Appendix shall be filed in this Court and served on or before June 15, 1962. Petitioner shall serve its designation of the contents of the Joint Appendix on or before April 17, 1962. Respondent shall serve its designation of the contents of the Joint Appendix on or before April 24, 1962. Any further designation by petitioner shall be served on or before May 1, 1962.

B. Each party shall bear the expense of printing in the Joint Appendix the portions of the record designated by it. Petitioner shall include in its designation and bear the expense of printing the Board's Decision and Order, this stipulation, and this Court's order thereon. The printing of the record shall be the responsibility of petitioner, provided that respondent furnishes it with a complete copy of the record from which to print.

C. It is further agreed that any party and the Court, in the briefs and at and following the hearing in the case, may refer to any portion of the original transcript of the record herein which has not been printed, to the same extent and effect as if such portions of the transcript had been printed or otherwise reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental Joint Appendix if the Court directs the same to be printed.

III. Filing of Briefs

Petitioner will file and serve its brief on or before June 15, 1962. Respondent will file and serve its brief on or before July 31, 1962. Petitioner will file and serve its reply brief, if any, on or before September 5, 1962. In lieu of filing and serving printed briefs on the designated dates, or any extension thereof, any party may on that date

serve a typewritten copy of its brief with printed copies to be filed and served within ten days thereafter.

/s/ Bernard Dunau
912 Dupont Circle Building, N. W.
Washington 6, D. C.
Attorney for Petitioner

April 17, 1962

/s/ Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.
Attorney for Respondent

April 18, 1962

[Filed April 25, 1962]

Before: Edgerton, Circuit Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their prehearing stipulation dated April 18, 1962, pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby, approved, and it is

ORDERED that the stipulation shall control further proceedings in this case and that the stipulation and this order shall be printed in the joint appendix.

Dated: April 25, 1962

134 NLRB No. 138

D-2431
St. Louis, MissouriUNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARDDISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO

and

Case No. 14-CE-5

GREATER ST. LOUIS AUTOMOTIVE TRIMMERS
AND UPHOLSTERERS ASSOCIATION, INC.

and

GREATER ST. LOUIS AUTOMOTIVE ASSOCIATION, INC.

Party to the Contract

DECISION AND ORDER

Upon charges duly filed by the Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc., herein called the Trimmers Association, the General Counsel of the National Labor Relations Board, by the Regional Director for the Fourteenth Region, on December 20, 1960, issued a complaint alleging that District No. 9, International Association of Machinists, AFL-CIO, herein called the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(e) and Sections 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent, and copies of the complaint and notice of hearing were duly served upon the charging party, and upon Greater St. Louis Automotive Association, Inc., herein called the Car Dealers Association, a party to the contract.

With respect to the unfair labor practices, the complaint alleges, in substance, that the Respondent and members of the Car Dealers Association have reaffirmed and are continuing to maintain and give effect to a contract clause, pursuant to which the members of the Car Dealers Association have ceased or refrained, and have agreed to cease and

refrain from handling, using, selling, transporting, or otherwise dealing in the products of other employers, or from doing business with other persons.

On January 25, 1961 all parties to this proceeding entered into a stipulation of facts, and on the same date jointly agreed to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and decision and order. The stipulation states, in substance, that the parties have waived their rights to a hearing before a trial examiner, and to the issuance of an intermediate report, and provides, further, that the charges, complaint, and stipulation of facts constitute the entire record in the case. On February 1, 1961, the Board approved the stipulation, ordered the transfer of the proceeding to the Board, and granted permission to the parties to file briefs. The General Counsel filed a brief and proposed conclusions of law, and the Respondent filed a Motion to Dismiss. On February 6, 1961, the Board approved a Stipulation of Corrections to Stipulation of the Record, and on July 27, 1961, the Board approved an Amendment to the Stipulation of Record filed by the parties on July 24, 1961.

Upon the basis of the parties' stipulations, the General Counsel's brief and proposed conclusions of law, and the entire record in the case,^{1/} the Board makes the following:

FINDINGS OF FACT

I. COMMERCE

The Car Dealers Association is a nonprofit corporation duly organized under and existing by virtue of the laws of the State of Missouri. It is an employer association consisting of firms in the St. Louis, Missouri,

^{1/} Respondent's motion to consolidate the instant proceeding with Automotive, Petroleum & Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.), Case No. 14-CE-1, for the purpose of decision is hereby denied, inter alia, because of the dissimilarity of issues presented in the cases and diversity of parties.

area, and was formed for the purpose of, and has continuously engaged in, collective bargaining for its member companies. The member companies of the Car Dealers Association are engaged in selling and servicing automobiles and automotive parts. During the past year the member companies of the Car Dealers Association conducted a gross volume of business exceeding \$500,000, and, during the same period, purchased and received goods valued in excess of \$50,000 directly from points outside the State of Missouri. The parties stipulated, and we find, that the Car Dealers Association is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.^{2/}

II. THE LABOR ORGANIZATION INVOLVED

District No. 9, International Association of Machinists, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The facts, as stipulated, show that on or about August 15, 1959, the Respondent and the Car Dealers Association negotiated a contract which was thereafter signed individually by various members of the Car Dealers Association, including Gene Jantzen Chevrolet Company. The contract contained the following clause:

ARTICLE XXIX

Subcontracting Work

Section I. Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists.

^{2/} For jurisdictional purposes, it is sufficient, as we find, that the Car Dealers Association was party to the contract with the Respondent Union. Cf. General Drivers, Chauffeurs and Helpers, Local Union No. 886, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (ADA Transit Mix), 130 NLRB No. 55 at p. 4.

On October 6, 1960, the Respondent requested that the Car Dealers Association, under the terms of the contract, mediate the alleged violation of Article XXIX by Gene Jantzen Chevrolet Company. Pursuant to the request of the Respondent, the mediation panel, consisting of three representatives of the Respondent and three representatives of the Car Dealers Association, met on October 26, 1960. The Respondent alleged at the meeting that Gene Jantzen Chevrolet Company was violating Article XXIX by failing to give preference to subcontractors having contracts with the Respondent in the subcontracting of auto trim work to members of the Trimmers Association. The Respondent requested the mediation panel to find that Gene Jantzen Chevrolet Company had breached Article XXIX and to instruct members of the Car Dealers Association that they are to comply with its terms. On November 2, 1960, the mediation panel unanimously decided that Article XXIX was binding on all members of the Car Dealers Association.

The General Counsel, in his brief, contends that Article XXIX requires the Car Dealers Association and its members to cease or refrain from doing business with other persons within the meaning of Section 8(e) of the Act, as amended.^{3/} He contends that the questioned clause limits the right of the Car Dealers Association members to subcontract work, in that such subcontracting can be done only with employers having a collective bargaining agreement with or "approved" by the Respondent, and thus abdicates to the Respondent the right of the Car Dealers Association's members to determine with whom they will do business. The General Counsel reasons that in view of the Respondent's interest in

^{3/} Section 8(e) provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . ."

having subcontracted work done by its members, it is highly unlikely that the Respondent would approve a nonunion subcontractor, and that since the Car Dealers Association and its members cannot compel a subcontractor to hire members of the Respondent, the only recourse available to the members of the Car Dealers Association is to cease dealing with subcontractors or subcontractors not "approved" by the Respondent until such time as economic pressures force the subcontractor to seek collective bargaining agreements with the Respondent.

The General Counsel contends further that by the action of the mediation panel on November 2, 1960, the parties reaffirmed and continued to maintain and give effect to Article XXIX, and by so doing "entered into" an implied agreement within the meaning of Section 8(e). The General Counsel does not alleged that the contract executed on August 15, 1959, was entered into in violation of Section 8(e), but does maintain that Article XXIX was incorporated by reference into the implied agreement of November 2, 1960, and that Article XXIX is properly introduced for the sole purpose of evidencing the terms of the new implied agreement and to prove its violative nature.

The Respondent, in its motion to dismiss, contends that Article XXIX is not in violation of Section 8(e), and that the activities of the Respondent do not have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and do not constitute unfair labor practices affecting commerce within Sections 8(e) and 2(6) and (7) of the Act.

Article XXIX specifies that the employer must, in the contracting out of work, give preference to a shop having a contract with the Respondent, or to a shop approved by the Respondent. The record indicates that the Respondent apparently refused to approve and then sought mediation of an alleged violation of Article XXIX by one member of the Car Dealers Association who failed "to give preference to subcontractors having contracts with the Respondent in subcontracting auto trim work

to members of the Charging Party . . . ^{4/} The record further indicates that the mediation panel found Article XXIX binding on all parties. The effect of Article XXIX, then, as written and interpreted by the parties, is the cessation of business between the contracting employers and subcontractors not under contract with the Respondent.

The contract clause which prohibits, limits or restricts subcontracting of work ordinarily performed by employees in the unit covered by the contract is fairly common in modern collective bargaining agreements.^{5/} Generally, the purpose and object of such restrictions is to preserve the jobs and job rights of the employees in the unit covered by the contract. We do not in this case decide whether such contract clauses are lawful or unlawful. However, Article XXIX is more than a restriction on subcontracting for the preservation of jobs and job rights of employees. Article XXIX allows subcontracting of work ordinarily performed by employees covered by the contract. It limits the persons with whom the employer can do business. We see no meaningful distinction between a contract which prohibits an employer from handling products produced by a nonunion firm and a contract which causes an employer to cease subcontracting work to a nonunion firm. Both clearly contravene Section 8(e). We find, therefore, that Article XXIX, as written, construed and given effect by the parties, was intended to cause a cessation of business between the Car Dealers Association and its members and members of the Trimmers Association who were not parties to a contract with the Respondent, and hence falls within the proscriptive purview of Section 8(e) of the Act.^{6/}

^{4/} Stipulation of the Record, p. 4, par. XII.

^{5/} For a more complete discussion of the scope and frequency of such contracts see Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Labor Rev. 579 (1961).

^{6/} Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent (E. A. Gallagher & Sons), 131 NLRB No. 117.

No unfair labor practice arises under Section 8(e) unless a labor organization and an employer "enter into" a proscribed contract. The contract between the Respondent and the Dealers Association and its members containing Article XXIX became effective as of August 15, 1959. Section 8(e), which became effective on November 13, 1959, states that "any contract or agreement entered into heretofore or hereafter containing [a proscribed contract clause] shall be to such extent unenforcible and void . . ." Hence, Article XXIX became unenforcible and void on November 13, 1959.

The General Counsel contends that the parties by action of the mediation panel "entered into" an implied agreement on November 2, 1960, which incorporated Article XXIX by reference. The complaint alleges that by the action of the Car Dealers Association and Respondent they have "reaffirmed and are continuing to maintain and give effect" to Article XXIX. The question presented is whether the parties, by so agreeing that Article XXIX was binding on all members of the Car Dealers Association, did reaffirm, maintain and give effect to Article XXIX, already rendered void and unenforcible by operation of law, and thus did "enter into" a proscribed agreement under Section 8(e) after the effective date of that Section.

With the passage of the Labor-Management Reporting and Disclosure Act of 1959, Congress in broad terms made the "entering into" of contracts such as Article XXIX an unfair labor practice under Section 8(e) and also made attempts to secure such contracts by threats, restraint or coercion of any person engaged in commerce a separate unfair labor practice under Section 8(b)(4)(A).

As noted, all such contracts entered into prior to and after the effective date of the amendments were made unenforcible and void. Thus, it is plain that Congress was legislating to eradicate any form, existence or enforcement of such contracts as against public policy, with the exception as provided for the garment and construction

industries.^{7/} We do not think that Congress intended to leave a gap, whereby contracts executed prior to the effective date of the amendments and rendered void and unenforcible as between the parties by the passage of the amendments, would continue to be lawful agreements for unfair labor practices purposes simply because they were executed prior to the effective date of the amendments but were reaffirmed, maintained or given effect after the effective date of Section 8(e).

The very language of Section 8(e) which proscribes the "entering into" of contracts or agreements, express or implied, is broad and sweeping in scope. The term "enter into" at law means "to join with another or with others"^{8/} or "to become bound or obligated by a . . . contract."^{9/} Even though Article XXIX was void and a nullity in the eyes of the law, the parties agreed that "Article XXIX was binding on all members of the Car Dealers Association." The parties maintained, reaffirmed and gave effect to Article XXIX thereby becoming bound by it. Accordingly, we find, in agreement with the General Counsel, that the Respondent and the Car Dealers Association did "enter into" an agreement on November 2, 1960, which incorporated Article XXIX, and by so doing violated Section 8(e) of the Act.^{10/}

^{7/} The legislative history of the Landrum-Griffin Act reveals clearly that one of the purposes of Congress was to close the "loophole" created by Local 176, United Brotherhood of Carpenters & Joiners v. N.L.R.B., 357 U.S. 93 (1958), in which, briefly stated, the execution or mere existence of "hot cargo" agreements were not held in violation of the secondary boycott provisions of the Act. See, e.g., Sen. Rep. No. 187, 86th Cong., 1st Sess. 79-80 (1959), I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (U.S. Gov't Printing Office) 475-76 (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess. 20-21 (1959), I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (U.S. Gov't Printing Office) 778-79 (1959).

^{8/} Ballentine, Law Dictionary (2d ed. 1948).

^{9/} 30 C.J.S., Enter; Fire Ass'n of Philadelphia v. Ruby, 60 Neb. 216, 224, 82 N.W. 629, 631.

^{10/} Automotive, Petroleum & Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.), 134 NLRB No. 139.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. District No. 9, International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Greater St. Louis Automotive Association Inc. and its members, are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By reaffirming, maintaining, and giving effect to a contract with the members of the Greater St. Louis Automotive Association, Inc., whereby those Employers agreed that whenever they found it feasible to send work out that comes under the jurisdiction of Respondent Union and the contract, preference would be given to shops or subcontractors approved or having contracts with District No. 9, International Association of Machinists, AFL-CIO, the Respondent Union violated Section 8(e) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, District No. 9, International Association of Machinists, AFL-CIO, St. Louis, Missouri, and its

officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, or enforcing the contract entered into by District No. 9 and the members of the Car Dealers Association on or about August 15, 1959, or on or about November 2, 1960, insofar as said contract provides that:

Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists.

(b) Entering into, actively maintaining, giving effect to or enforcing any other contract or agreement, express or implied, whereby the members of the Dealers Association cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places in Respondent's business offices, meeting halls, and places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix A."^{11/} Copies of said notice to be furnished by the Regional Director for the Fourteenth Region, shall, after being duly signed by official representatives of Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

^{11/} In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words, "Pursuant to a Decision and Order" the words, "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(b) Furnish to the Regional Director for the Fourteenth Region signed copies of the aforementioned notice for posting by members of the Greater St. Louis Automotive Association, Inc., St. Louis, Missouri, if the Companies agree, in places where notices to employees are customarily posted. Copies of said notice to be furnished by the Regional Director shall, after being signed by Respondent, as indicated, be forthwith returned to the Regional Director for disposition by him.

(c) Notify the Regional Director for the Fourteenth Region in writing, within 10 days from the date of this Order, of the steps taken to comply herewith.

Dated, Washington, D. C. Dec. 19, 1961

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBERS FANNING and BROWN, concurring and dissenting:

We would dismiss the complaint in this case for the same basic considerations as impelled our dissent in a companion case issued this same date, ^{12/} namely, we are unable to find that the record preponderantly establishes that Respondent has entered into (as distinguished from attempted to enforce) the alleged 8(e) contract under consideration here.

Dated, Washington, D. C. Dec. 19, 1961

John H. Fanning, Member

Gerald A. Brown Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

^{12/} Automotive, Petroleum & Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Greater St. Louis Automobile Trimmers and Upholsterers Association, Inc.), 134 NLRB No. 139.

APPENDIX A

NOTICE

TO ALL OUR MEMBERS AND TO ALL EMPLOYEES
OF EMPLOYER-MEMBERS OF GREATER ST. LOUIS
AUTOMOTIVE ASSOCIATION, INC.

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the
policies of the National Labor Relations Act, we hereby give notice that:

WE WILL NOT enter into, actively maintain, give effect to or
enforce any contract or agreement, express or implied, with
any member of GREATER ST. LOUIS AUTOMOTIVE ASSOCI-
ATION, INC., whereby such employer ceases or refrains, or
agrees to cease or refrain, from handling, using, selling,
transporting, or otherwise dealing in any of the products of
any other employer, or from doing business with any other
person.

WE WILL NOT maintain, give effect to, or enforce the contract
entered into by the members of the GREATER ST. LOUIS
AUTOMOTIVE ASSOCIATION, INC., and the undersigned Union
on or about August 15, 1959, or on or about November 2, 1960,
insofar as said contract provides that:

Whenever the Employer finds it feasible to send work
out that comes under the jurisdiction of the Union and
this contract, preference must be given to such shop
or subcontractors approved or having contracts with
District No. 9, International Association of Machinists.

DISTRICT NO. 9, INTERNATIONAL
ASSOCIATION OF MACHINISTS,
AFL-CIO

(Labor Organization)

Dated _____ by _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced,
or covered by any other material.

[Approved 2/6/61]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTEENTH REGION

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO

and

Case No. 14-CE-5

GREATER ST. LOUIS AUTOMOTIVE TRIMMERS
AND UPHOLSTERERS ASSOCIATION, INC.

and

GREATER ST. LOUIS AUTOMOTIVE ASSOCIATION, INC.

Party to the Contract

STIPULATION OF THE RECORD

IT IS HEREBY STIPULATED AND AGREED by and between District No. 9, International Association of Machinists, AFL-CIO, hereinafter called Respondent; and Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc., hereinafter called the Charging Party; and Greater St. Louis Automotive Association, Inc., hereinafter called the Car Dealers Association; and the General Counsel of the National Labor Relations Board, as follows:

I

Upon charges filed by the Charging Party on the 5th day of December, 1960, and served on the Respondent on the 5th day of December, 1960, receipt of which is hereby acknowledged by said Respondent, the General Counsel for the National Labor Relations Board, acting pursuant to authority granted by Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, and pursuant to the Board's Rules and Regulations, Series 8, Section 102.15, duly issued a Complaint and Notice of Hearing on the 20th day of December, 1960, against the Respondent herein, receipt of which is hereby acknowledged.

II

This Stipulation, together with the Charge, Complaint, Notice of Hearing, Affidavit of Service, and other proofs of service of the said

Charge, Complaint, and Notice of Hearing shall constitute the entire record herein and shall be filed with the Board for findings of fact, conclusions of law and order directly by the Board.

III

None of the parties shall in any way be prejudiced by the failure to file an Answer.

IV

The Charging Party is, and at all times herein mentioned has been, a non-profit corporation, duly organized under the laws of the State of Missouri. The Charging Party is an employer association consisting of some ten member companies formed for the purpose of bargaining collectively for its member companies. Said member companies have their premises located in St. Louis, Missouri, and are now, and at all times material hereto have been, continuously engaged in the fabrication, installation, and sale of automotive seat covers, convertible tops, and upholstery trim for automotive dealers and for individual customers.

V

Charging Party has, in the 12-month period preceding the issuance of Complaint in this proceeding, through its members, in the course and conduct of their businesses, purchased goods and materials valued in excess of \$50,000, which goods and materials were shipped directly to their respective premises in St. Louis, Missouri, from points and places outside the State of Missouri.

VI

The Car Dealers Association is, and at all times herein mentioned has been, a non-profit corporation duly organized under and existing by virtue of the laws of the State of Missouri. The Car Dealers Association is an employer association consisting of firms in the St. Louis, Missouri, area, including Gene Jantzen Chevrolet Company, and was formed for the purpose of, and has continuously engaged in, collective bargaining for its member companies. The member companies of said Car Dealers Association are engaged in selling and servicing automobiles and automotive parts.

VII

In the operation of their businesses, the member companies of the Car Dealers Association, during the last 12 months preceding the issuance of complaint in this proceeding, conducted a gross volume of business exceeding \$500,000, and, during the same period, purchased automobiles and automotive parts valued in excess of \$50,000, which were shipped directly to their respective premises in and around St. Louis, Missouri, from points and places outside the State of Missouri.

VIII

The Charging Party and the Car Dealers Association are Employers, and at all times material herein have been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IX

Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

X

On or about August 15, 1959, Respondent negotiated a contract with the Car Dealers Association, which contract was thereafter signed individually by various members of said Car Dealers Association, including Gene Jantzen Chevrolet Company, and contained the following clause:

ARTICLE XXIX
Sub-Contracting Work

Section 1. Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists.

XI

On or about October 6, 1960, District No. 9, International Association of Machinists, by its representative, Nelson Briner, forwarded a letter to the Car Dealers Association requesting ^{mediation} arbitration, under the terms of the aforementioned contract, of alleged violations of Article XXIX by Gene Jantzen Chevrolet Company.

XII

On or about October 26, 1960, an ^{mediation} ~~arbitration~~ panel consisting of three representatives of the Respondent and three representatives of the Car Dealers met at 634 North Grand Boulevard, pursuant to the request of Respondent. At the meeting of said ^{mediation} ~~arbitration~~ panel, the Respondent, through its representatives, alleged that Gene Jantzen Chevrolet Company was violating said Article XXIX by failing to give preference to subcontractors having contracts with the Respondent in the subcontracting of auto trim work to members of the Charging Party association. Respondent, through its representatives, requested the ^{mediation} ~~arbitration~~ panel to find that ^{Gene Jantzen Chevrolet Company} ~~the Employer~~ had thereby breached Article XXIX and to instruct its members that they are obliged to comply with its terms.

XIII

On or about November 2, 1960, the aforementioned ^{mediation} ~~arbitration~~ panel unanimously decided that said Article XXIX was binding upon all members of the Car Dealers Association.

XIV

All parties hereto expressly waived their right to the filing of an Answer, a hearing before a Trial Examiner, and Intermediate Report of a Trial Examiner, and agree that this Stipulation shall be the sole and only evidence received or considered by the National Labor Relations Board. Within 20 days or within such further period as the Board shall allow from the date of the execution of this Stipulation, any party may file with the National Labor Relations Board in Washington, D.C., an original and six (6) copies of a Motion to Dismiss Complaint, or, in the alternative, proposed findings of fact or conclusions of law, and immediately upon filing shall serve a copy on each of the other parties. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Should any party desire to argue orally before the Board, the request shall be governed by Section 102.46(c) of the Rules and Regulations of the Board, Series 8, as amended. The provisions of Section 10(e) and 10(f) are not ^{waived} ~~served~~ by this Stipulation.

IT IS FURTHER STIPULATED AND AGREED that this Stipulation embodies the entire agreement between the parties, and there is no oral agreement of any kind which varies, alters, or changes it in any respect. If for any reason this Stipulation shall not be signed by all the parties hereto, or should fail to be fully effective according to its terms, this Stipulation shall be null and void for all purposes and shall not be offered or received in evidence in any proceeding.

IN WITNESS WHEREOF the parties hereto have caused this Stipulation of the Record to be executed by their duly authorized representatives this _____ day of January, 1961.

Date: Jan. <u>18</u> , 1961	District No. 9, International Association of Machinists, AFL-CIO
	By _____ /s/ Louis P. Poulton Attorney (Name) (Title)
Date: Jan. <u>25</u> , 1961	Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.
	By _____ /s/ William E. Coday Attorney (Name) (Title)
Date: Jan. <u>24</u> , 1961	Greater St. Louis Automotive Association, Inc.
	By _____ /s/ E. M. Hayward Ex. Vice Pres. (Name) (Title)

/s/ John W. Noble, Jr.
John W. Noble, Jr.
Counsel for the General Counsel
Fourteenth Region
National Labor Relations Board
St. Louis, Missouri

[Approved July 27, 1961]

AMENDMENT TO STIPULATION OF THE RECORD

IT IS HEREBY STIPULATED AND AGREED by and between District No. 9, International Association of Machinists, AFL-CIO; Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.; Greater St. Louis Automotive Association, Inc.; and the General

Counsel of the National Labor Relations Board, as follows:

That Paragraph II of the Stipulation of the Record, entered into by and between the parties named above, through their representatives, on January 25, 1961, be amended to include as part of the record herein the following document hereto attached:

a) Standard Automotive Agreement, negotiated by and between the Greater St. Louis Automotive Association and District No. 9, International Association of Machinists, (which parties are also referred to in the aforesaid Stipulation of the Record as Car Dealers Association and Respondent, respectively).

IT IS FURTHER STIPULATED that the Standard Automotive Agreement referred to in Paragraph (a) above is identical with the "contract" referred to in Paragraphs X and XI of the aforesaid Stipulation of the Record.

IT IS FURTHER STIPULATED AND AGREED by and between the parties that the sole authority for the convoking of the mediation panel referred to in paragraphs XII and XIII of the aforesaid Stipulation of the Record is Article VIII of the Standard Automotive Agreement referred to in section (a) above.

The documents described and set forth in the aforesaid Stipulation of the Record and the document described in section (a) of this Amendment to said Stipulation shall constitute the entire record herein and shall be filed with the National Labor Relations Board for findings of fact, conclusions of law and order directly by the Board.

The Stipulation and this Amendment are made without prejudice to any objection that any party may have as to the materiality or competency of any facts stated herein.

IT IS FURTHER STIPULATED AND AGREED that the aforesaid Stipulation of the Record shall remain as the entire agreement of the parties except and only to the extent that it is modified by this Amendment.

IN WITNESS WHEREOF the parties hereto have caused this Amendment to Stipulation of the Record to be executed by their duly authorized representatives on the dates specified below.

Date: July 17, 1961 District No. 9, International Association of
Machinists, AFL-CIO

By /s/ Louis P. Poulton Grand Lodge Attorney
(Name) (Title)

Date: July 11, 1961 Greater St. Louis Automotive Trimmers and Upholsters Association, Inc.

By /s/ Moller & Talent by Glenn L. Moller

Date: July 11th, 1961 Greater St. Louis Automotive Association, Inc.
By /s/ E. M. Hayward Ex Vice President
(Name) (Title)

/s/ John W. Noble, Jr.
John W. Noble, Jr.
Counsel for the General Counsel
Fourteenth Region
National Labor Relations Board
St. Louis, Missouri

Date: July 20, 1961

STANDARD AUTOMOTIVE AGREEMENT

AGREEMENT by and between _____,
party of the first part, hereinafter called the "Employer," and District
No. 9, International Association of Machinists, party of the second part,
hereinafter called the "Union."

In the application or interpretation of this contract, the agreement
between the Employer and the Union shall be conclusive and binding upon
all persons affected.

ARTICLE I

Jurisdiction and Recognition

Section 1. The Company recognizes the Union as the exclusive
representative of all employees in the unit which is as follows: Journey-
men automobile and truck mechanics, machinists, electrical machinists,
welders, trimmers, metal men, fender, body, painter, radiator repair-
men, refrigeration, automotive air conditioning mechanics, service
salesmen and towermen, apprentices and working foremen.

Section 2. Definition of a Journeyman Automotive Mechanic: A
journeyman automotive mechanic is one who has served an apprenticeship
of four years in the automotive mechanics' trade, or a person who has
worked four years at the automotive mechanics' trade in any of its
branches or subdivisions, and who can, with the aid of tools, repair,
erect, assemble, dismantle and maintain automotive equipment or parts
thereof:

Section 3. An automotive mechanic apprentice is one who has been
employed to learn the automotive mechanics' trade and shall be given full
opportunity to do so and will be advanced as rapidly as his knowledge and
fitness merit. One (1) apprentice may be employed for each five (5)
journeymen employed in each shop, but in any event one (1) apprentice
may be employed in each shop.

* * * * *

ARTICLE VIII

Grievance Procedure and Strike Clause

Section 1. During the term of this agreement, the Employer will not cause any lock-outs, nor will the Union cause any strikes, stoppages, or suspension of work, until the procedures prescribed by Article VIII, the same relating to the handling and adjustment of grievances, shall have been exhausted, and said procedures shall be available to both Employer and Union.

Section 2. The term "Grievance" shall mean a dispute or difference involving the application or interpretation of any provision of this Agreement. Should grievances occur, the shop steward shall first endeavor to adjust same with the foreman, and, if not thus satisfactorily adjusted, such grievances shall be brought to the attention of the management by the steward or district representative.

Section 3. If such grievances are not thus satisfactorily adjusted, or if the Employer has a grievance, the same shall be referred to a committee for mediation consisting of three representatives of the Union and three representatives of the Employer, who shall be members of and appointed by the Greater St. Louis Automotive Association, Inc., and who are parties to a like Agreement. However, upon formal application for this committee to act, the said committee for mediation must render their decision within fifteen (15) days from official notice BY CERTIFIED OR REGISTERED MAIL unless an extension is mutually agreed to by both parties.

Section 4. In the event said joint committee for mediation is unable to arrive at a majority decision within the time prescribed, either party to this Agreement shall be free at any time, AFTER 20 DAYS' NOTICE TO THE OTHER PARTY, to cause lockouts, or to cause and engage in strikes, stoppages or suspensions of work.

* * * * *

ARTICLE XXI

Employees Doing Work of Another Union

Section 1. Employer shall not require or request employees to do any work that comes under the jurisdiction of any other Labor Union. However, when employees have permission to perform duties covered by Local Unions affiliated with the I.B. of T.C.W. & H. of A., or I. A. of M., they shall receive their required rate of pay. Should any of these Locals demand that the member cease such work he cannot be penalized for doing so.

* * * * *

ARTICLE XXIX

Sub-Contracting Work

Section 1. Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or sub-contractors approved or having contracts with District No. 9, International Association of Machinists.

* * * * *

ARTICLE XXXVI

Termination

Section 1. The terms between the parties to this Agreement shall be effective August 1, 1959 and shall be in effect to July 31, 1964, inclusive, but shall automatically renew itself, unless either party hereto shall give notice to the other party of a desire to revise, amend, or terminate this Agreement, sixty days before the expiration date hereto provided.

Section 2. In the event of a declaration by the President of the United States of a National Emergency involving war, or the mobilization of the armed forces of this country, which causes the economy of this country to be substantially affected, then either party to this contract

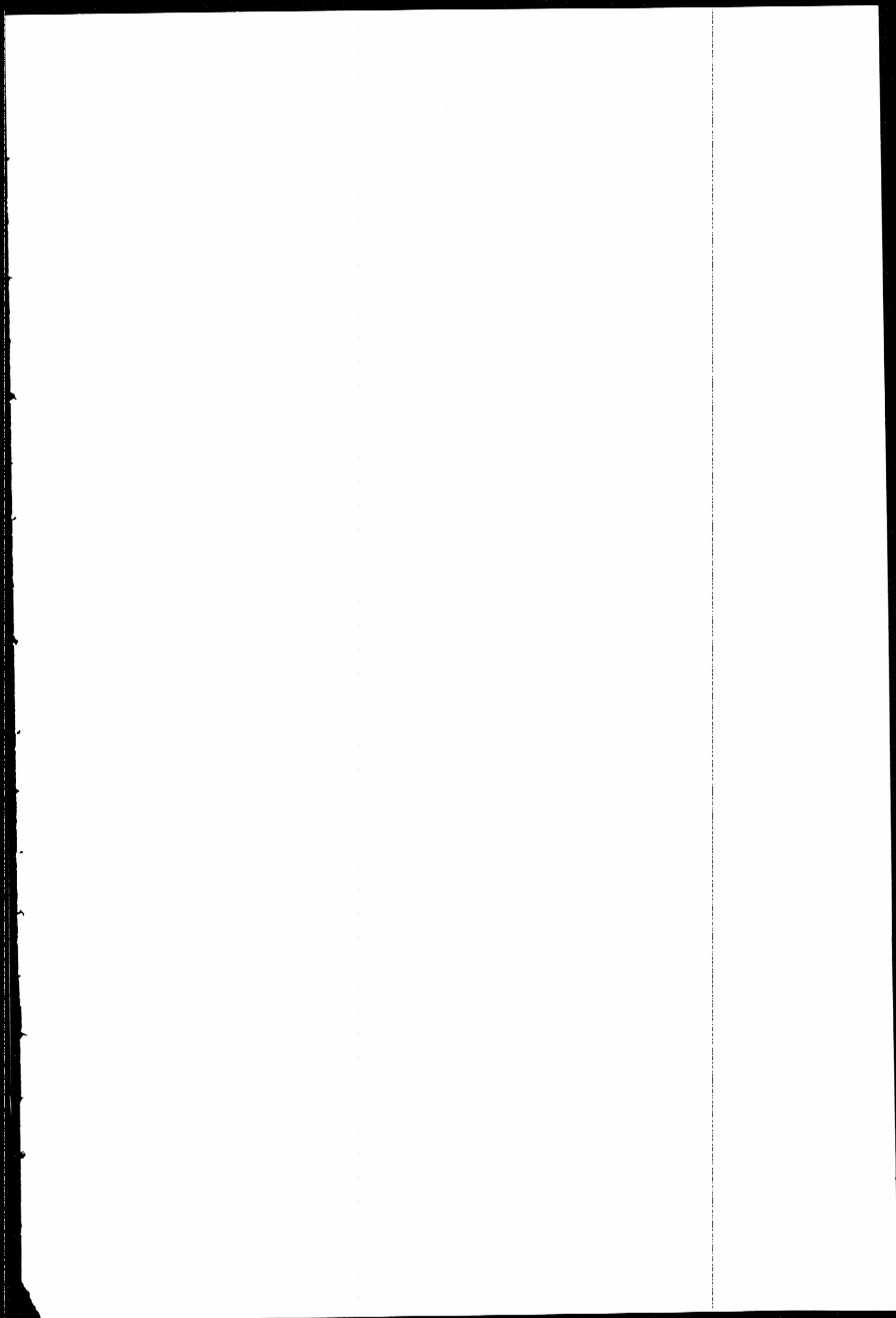
may reopen the contract between August 1, 1959 and July 31, 1964, inclusive, for the purpose of negotiation of wage scales only, upon sixty days' notice to the other party.

EMPLOYER

UNION

By _____

By _____
Representative



BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition To Review And Set Aside And On
Request To Enforce An Order Of
The National Labor Relations Board

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 15 1962

Joseph W. Stewart

CLERK

PLATO E. PAPPS

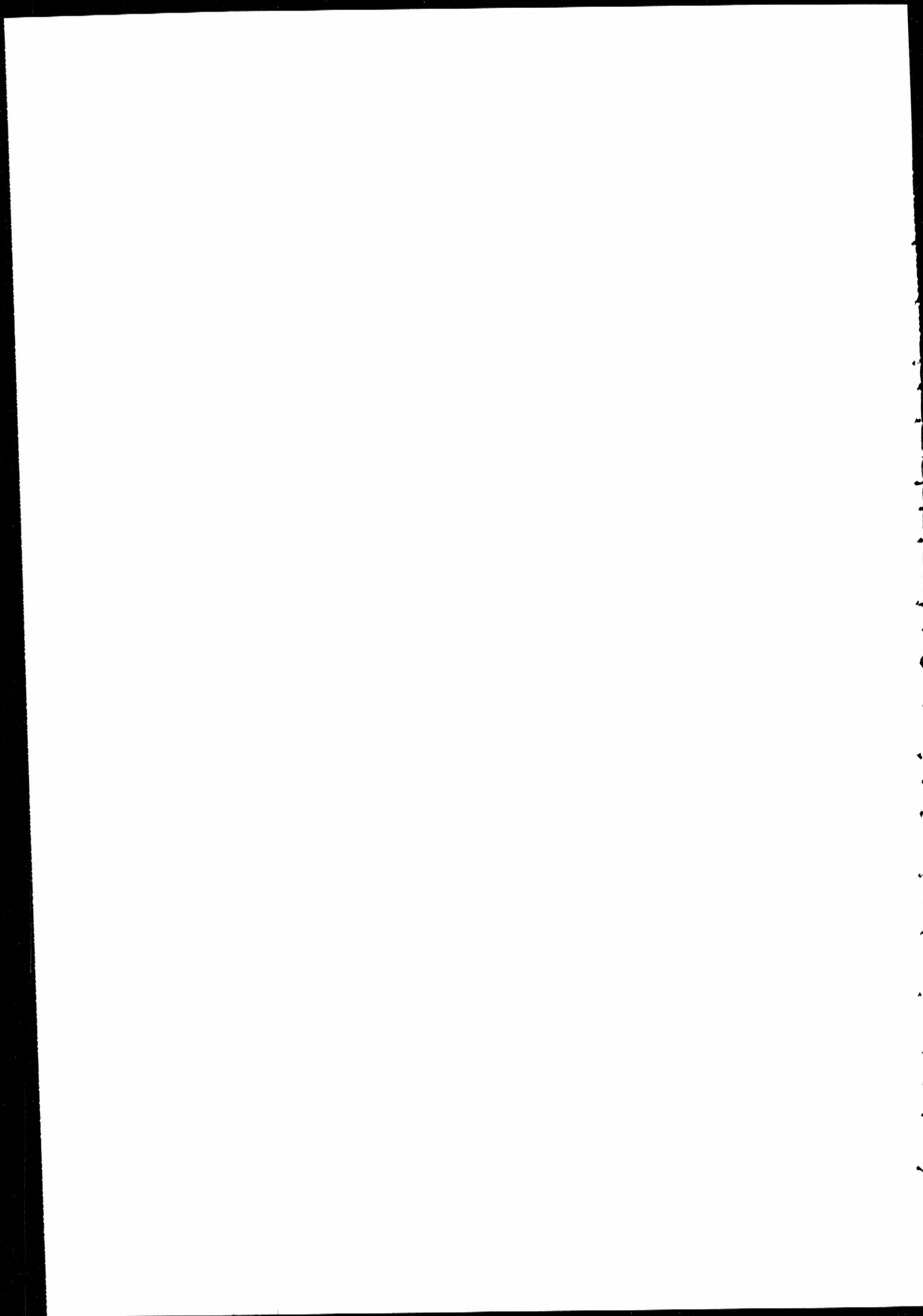
LOUIS P. POULTON

1300 Connecticut Ave., N.W.
Washington 6, D. C.

BERNARD DUNAU

912 Dupont Circle Building
Washington 6, D. C.

Attorneys for Petitioner



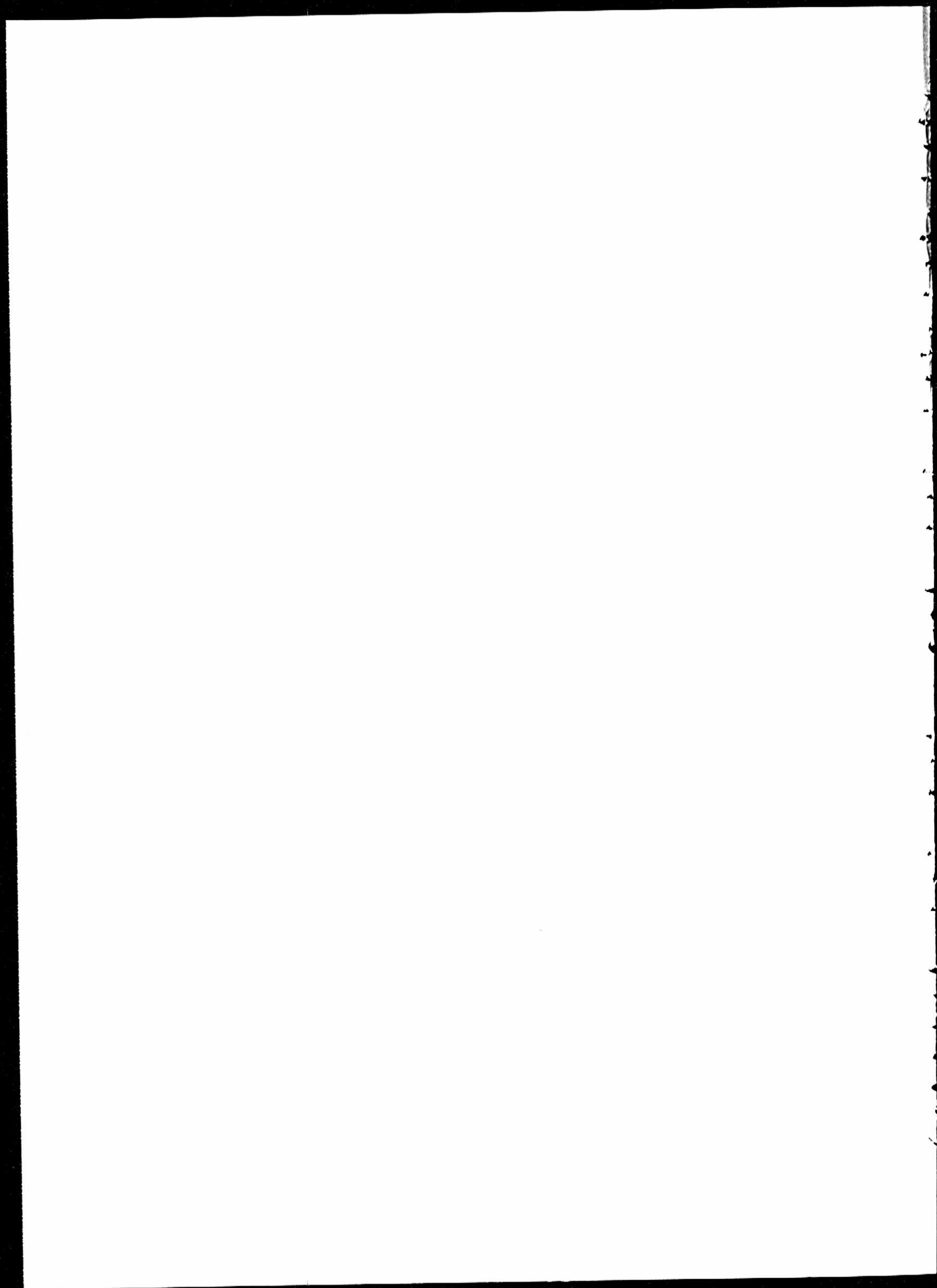
(i)

STATEMENT OF QUESTIONS PRESENTED

The issues as identified by the parties in the prehearing conference stipulation are as follows (J.A. 1):

A collective bargaining agreement contains the provision that: "Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists." The National Labor Relations Board found that this provision was prohibited by section 8(e) of the National Labor Relations Act, as amended, and that, by "re-affirming, maintaining, and giving effect to" the provision after the effective date of section 8(e), petitioner and an employer association did "enter into" the provision within the meaning of section 8(e) subsequent to its effective date. Two questions are presented:

1. Whether the provision was entered into within the meaning of section 8(e) subsequent to its effective date.
2. Whether the provision is prohibited by section 8(e).



INDEX

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	(i)
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Stipulated Facts	3
B. The Board's Conclusions	5
STATEMENT OF POINTS	6
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. The Union and the Car Dealers Association Did Not "Enter Into" an Agreement by the Decision of the Mediation Panel that Article XXIX Was Binding Upon All Members of the Association	9
II. Section 8 (e) of the National Labor Relations Act Does Not Prohibit an Agreement Providing That, "Whenever the Employer Finds it Feasible to Send Work Out that Comes Under the Jurisdiction of the Union and this Contract, Preference Must be Given To Such Shop or Subcontractors Approved or Having Contracts with District No. 9, International Association of Machinists."	19
A. Introduction	19
B. Precis of the Difference Between a Work Preemption Agreement and a Hot Cargo Agreement	21
C. A Work Preemption Provision is Inherent in a Collective Bargaining Agreement and Efforts to Obtain It Constitute Protected Activity	24
D. Section 8 (e) of the Act Prohibits Only the Hot Cargo Agreement, a Type of Agreement Wholly Different in Terms and Purpose from a Work Preemption Agreement	29
1. The Terms of Section 8 (e) Considered in the Light of the Cognate Terms Employed in Section 8 (b)(4)(B) Prohibit Only an Agreement to Sanction a Secondary Boycott-The "Hot Cargo" Agreement	29

	<u>Page</u>
2. The Purpose and History of Section 8 (e) Confirm that it Prohibits the Hot Cargo Agreement Only	31
3. Two Minority Statements Suggesting that Section 8 (e) Prohibits a Work Preemption Agreement Are Without Significance	39
E. Section 8 (e) Does Not Prohibit a Requirement That, When Work is to be Contracted Out, It Shall Be Let Only to Persons Under Contract With the Union or Approved by It	41
1. The Validity of an Absolute Prohibition Against Contracting Out Establishes the Validity of an Agreement which Conditions But Does Not Prohibit Contracting Out	41
2. The Provisos to Section 8 (e) Pertaining to The Construction and Clothing Industries do Not Imply that a Limitation Upon the Class of Persons to Whom Work May be Subcontracted Is Prohibited in Any Other Industries	47
(a) The construction industry	47
(b) The apparel and clothing industry	48
CONCLUSION	55

AUTHORITIES CITED

Cases:

Akron, Canton & Youngstown R. R. Co., 22 LA 392	25
* Alpert v. Excavating and Building Materials Union, 184 F. Supp. 448 (D. C. Mass.)	16, 17
Apex Hosiery Co. v. Leader, 310 U.S. 469	43
Bonnaz v. National Labor Relations Board, 97 U.S. App. D.C. 234, 230 F. 2d 47	19
Braniff Airways, Inc. v. Civil Aeronautics Board, C.A.D.C. No. 16499, sl. op. pp. 7-8, decided May 24, 1962	21
California Sportswear & Dress Assn. Inc., 54 FTC 835	49, 53
S. H. Camp v. National Labor Relations Board, 160 F. 2d 519 (C.A. 6)	40

	<u>Page</u>
Carpenters District Council v. National Labor Relations Board, 107 App. D.C. 61, 274 F. 2d 564	16, 21
Celanese Corp., 33 LA 925	26
Container Corp., 37 LA 252	26
Davis v. Massachusetts, 167 U.S. 43	9, 21
Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S.D. N.Y.)	50
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481	16
Federal-Mogul-Bower Bearings, Inc., 37 LA 867	26
General Drivers, Local 886 v. National Labor Relations Board, 101 App. D.C. 80, 247 F. 2d 71	14
General Tire & Rubber Co., 135 NLRB No. 28	27
Genuine Parts Co., 119 NLRB 399	32
Hanover Bank v. Commissioner, 30 U.S. Law Week 4385 (S. Ct. May 21, 1962)	19
* Haughton v. Columbia River District Council No. 5, 294 F. 2d 766 (C.A. 9)	31
Houston Building & Const. Trades Council (Claude Everett Const. Co.), 136 NLRB No. 28, 49 LRRM 1757	43
International Brotherhood of Electrical Workers v. National Labor Relations Board, 341 U.S. 694	30
International Longshoremen's Association, 127 NLRB 35	22, 27
* International Longshoremen's Local Union No. 19, 137 NLRB No. 13, 50 LRRM 1090	31, 47
International Union of Operating Engineers, 121 NLRB 1073	27
A.D. Juillard Co., Inc., 21 LA 713	25
Little v. Local 481, International Brotherhood of Electrical Workers, 50 LRRM 2141 (D.C.S.D. Ind.)	16
Local 41, International Hod Carriers Union (Calumet Contractors Assn.), 133 NLRB No. 57, 48 LRRM 1667	43
Local 761, International Union of Electrical Workers v. National Labor Relations Board, 366 U.S. 667	30, 31
Local No. 662, Radio and Television Engineers, 133 NLRB No. 165, 49 LRRM 1042	31
Local No. 48, Sheet Metal Workers International Association, 119 NLRB 287	22, 27

	<u>Page</u>
Local 24, Teamsters Union v. National Labor Relations Board, 266 F. 2d 675	31, 53
* Local 24, Teamsters Union v. Oliver, 358 U.S. 293, 362 U.S. 605	27, 28, 43
Local Union No. 505, Teamsters Union (Carolina Lumber Co.), 130 NLRB 1438	16
Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board, 357 U.S. 92	14, 16, 18, 31, 46, 48
Local 173, Wood, Wire & Metal Lathers Union, 121 NLRB 1094	27
Local Lodge No. 1424 v. National Labor Relations Board, 362 U.S. 411	13
Long Island News Corp., 35 LA 840	22
Los Angeles Mailers Union No. 9, 135 NLRB No. 107, 49 LRRM 1659	11, 13, 17
Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270	41
Mead Paper Co., 37 LA 342	26
National Association of Broadcast Engineers and Technicians, 103 NLRB 479	22
National Association of Broadcast Engineers and Technicians, 105 NLRB 355	22, 27
National Labor Relations Board v. Capital Transit Co., 95 App. D.C. 310, 221 F. 2d 864	21
National Labor Relations Board v. Denver Bldg. & Const. Trades Council, 341 U.S. 675	30
National Labor Relations Board v. Insurance Agents' International Union, 361 U.S. 477	23
National Labor Relations Board v. Radio and Television Broadcast Engineers Union, Local 1212, 364 U.S. 573	28
* National Labor Relations Board v. Local 294, Teamsters Union, 49 LRRM 2315 (C.A. 2, Dec. 26, 1961), enforcing 131 NLRB No. 42, sl. op. 5-10	16, 17
National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U.S. 87	41
National Labor Relations Board v. Local 1016, United Brotherhood of Carpenters, 273 F. 2d 686 (C.A. 2)	46
* Ohio Valley Carpenters District Council, 136 NLRB No. 89, 49 LRRM 1908	8, 21, 29
Operating Engineers Local Union No. 3 v. National Labor Relations Board, 105 U.S. App. D.C. 307, 266 F. 2d 905	55

	<u>Page</u>
Rabouin v. National Labor Relations Board, 105 F. 2d 906 (C.A. 2), affirming, 87 NLRB 972	13
Radio Broadcast Technicians, Local Union No. 1264, 123 NLRB 507	43
Radio & Television Broadcast Engineers Union, Local 1212, 114 NLRB 1354	22, 27
Retail Clerks International Association v. Lion Dry Goods, Inc., 369 U.S. 17	16
* Retail Clerks Union Local 770 v. National Labor Relations Board, 296 F. 2d 368 (C.A.D.C.)	25, 31, 45
Reynolds Metals Co., 37 LA 599	26
San Diego Building Trades Council v. Garmon, 359 U.S. 236	16
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384	41
Seafarers International Union v. National Labor Relations Board, 265 F. 2d 585 (C.A.D.C.)	31
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 332 U.S. 194	21
Sheet Metal Workers' International Association v. National Labor Relations Board, 293 F. 2d 141 (C.A.D.C.)	46
62 Cases v. United States, 340 U.S. 593	19
Socony Mobil Oil Co., 36 LA 631	26
Square D. Co., 37 LA 892	26
S.S. W., Inc. v. Air Transport Asso. of America, 89 U.S. App. D.C. 273, 191 F. 2d 658	16
* Timken Roller Bearing Co., 70 NLRB 500	27
Town & Country Mfg. Co., 136 NLRB No. 111, 49 LRRM 1918	27
Truck Drivers and Helpers Local Union No. 728 v. Empire State Express, Inc., 293 F. 2d 414 (C.A. 5), cert. denied, 368 U.S. 931	53
* UAW, Local 391 v. Webster Electric Co., 299 F. 2d 195 (C.A. 7)	25
United States v. American Trucking Association, 310 U.S. 534	19
United States v. Drum, 368 U.S. 370	44
United States Pipe & Foundry Co. v. National Labor Relations Board, 298 F. 2d 873 (C.A. 5)	44
U. S. Potash Co., 37 LA 442	26

United States Potash Co. v. Local 1912, International Association of Machinists, 270 F. 2d 496 (C.A. 10), cert. denied, 363 U.S. 845	26
United Steelworkers v. American Mfg. Co., 363 U.S. 564	25
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574	26
Vulcan Rivet & Bolt Corp., 37 LA 871	26
Warrior & Gulf Navigation Co., 36 LA 695	26

Statutes:

Labor Management Relations Act, 1947:	
Sec. 201 (b)	12
Sec. 204 (a)(1)	12

Labor Management Reporting and Disclosure Act, 1959 (P.L. 86-257, 86th Cong., 1st sess., 73 Stat. 542-544)	
Section 704	3
Section 707	3

National Labor Relations Act (61 Stat. 136, 29 U.S.C. § 151, et seq.):	
Section 8 (a)(3)	12
Section 8 (b)(2)	12
Section 8 (b)(4)(A)	11, 12, 29, 32, 36
Section 8 (b)(4)(B)	7, 12, 13, 14, 29, 30, 31, 48
Section 8 (b)(4)(D)	27, 28
Section 8 (b)(4)(i)	2
Section 8 (b)(4)(ii)(A)	2
Section 8 (b)(4)(ii)(B)	2
Section 8 (e)	2-19, 21, 23, 24, 28-31, 36, 39-41, 47, 48
Section 10 (b)	13
Section 10 (c)	1
Section 10 (f)	2
Section 10 (k)	28
Section 14 (b)	12
Section 102	12

Reports and Debates:

H. Rep. No. 741, 86th Cong., 1st Sess.	34
H. Rep. No. 1147, 86th Cong., 1st Sess.	36, 48
S. Min. Rep. No. 187, 86th Cong., 1st Sess.	33
95 Cong. Rec. 8709	49
105 Cong. Rec.:	
3951-52	37
5920	33
6556-58	34, 37, 39

Reports and Debates: (Cont'd.):

105 Cong. Rec.:

6667-69	39
6670	37
6730	39
15195	37
15552	37
15710	36
15848-9	50
15859	36
16414	36
16435	36
16588	39
16590	39
16653-54	36
17381	51
17674	37
17856-57	40
17884	40
17899	36
17900	48
17919-20	36
18153-54	36

105 Daily Cong. Rec. A4308	38
A6654	38
A8248	38
A8358	38

Miscellaneous:

Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086	23, 44
Address, The Law and Secondary Boycotts in Perspective, delivered before the Institute on Labor-Management Reporting and Disclosure Act of 1959, Emory University School of Law, the Lawyers Club of Atlanta, Atlanta, Georgia, Feb. 12, 1960	23
Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 413-415 (1960)	26
Cox, Law and the National Labor Policy, 34 (1960)	23
Hand, L. The Spirit of Liberty, 164 (Dilliard ed., Vintage Books, 1959)	18
Slichter, Healy, and Livernash, The Impact of Collective Bargaining on Management, 308-316 (1960)	26

(x)

	<u>Page</u>
Subcontracting Clauses in Major Collective Bargaining Agreements, Bull. No. 1304, Bur. Lab. Stat. Dept. of Lab. (1961)	26, 42, 53
Wolfson, The Role of the ILGWU in Stabilizing the Women's Garment Industry, 4 Ind. and Lab. Rel. Rev. 33 (1950)	53

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition To Review And Set Aside And On
Request To Enforce An Order Of
The National Labor Relations Board

BRIEF FOR PETITIONER

JURISDICTION

This case is before the Court on the petition of District No. 9, International Association of Machinists, AFL-CIO, herein called the Union, to review and set aside an order of the National Labor Relations Board issued on December 19, 1961, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, et seq.).

In its answer the Board requested enforcement of its order. The jurisdiction of this Court is based on Section 10(f) of the Act. The Board's decision and order are reported at 134 NLRB No. 138 (J.A. 4-15).

STATUTE INVOLVED

As amended in 1959, section 8(b)(4)(i) and (ii)(A) and (B) of the Act provides in part that it shall be an unfair labor practice for a union or its agents:

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or picketing. . . .

As enacted in 1959, section 8(e) of the Act provides in part that:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . .

The amendment of section 8(b)(4) and the enactment of section 8(e) were made by section 704, Title VII, Labor Management Reporting and Disclosure Act, 1959, which was passed on September 14, 1959, to be effective November 13, 1959 (P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 542-544). Section 707 provides that "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice, any act which was performed prior to such effective date which did not constitute an unfair labor practice prior thereto." 73 Stat. 546.

STATEMENT OF THE CASE

A. The Stipulated Facts.

All the facts are stipulated and show that:

Greater St. Louis Automotive Association, Inc., (herein called the Car Dealers Association), an employer association consisting of firms in the St. Louis, Missouri area, bargains collectively for its member companies (J.A. 17). The member companies sell and service automobiles and automotive parts (J.A. 17). Gene Jantzen Chevrolet Company is one such company (J.A. 17).

About August 15, 1959, the Union and the Car Dealers Association negotiated a contract, known as the standard automotive agreement, for a five-year term running from August 1, 1959, to July 31, 1964 (J.A. 18, 21, 23-26). The contract was thereafter signed individually by various members of the Car Dealers Association, including Gene Jantzen Chevrolet Company (J.A. 18). Article I of the contract, entitled "Jurisdiction and Recognition," provides in section 1 that (J.A. 23):

The Company recognizes the Union as the exclusive representative of all employees in the unit which is as follows: Journeymen automobile and truck mechanics, machinists, electrical machinists, welders, trimmers, metal men, fender, body, painter, radiator repairmen, refrigeration, automotive air conditioning mechanics, service salesmen and towermen, apprentices and working foremen.

Article XXIX of the contract, entitled "Sub-contracting Work," provides that (J.A. 18, 25):

Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or sub-contractors approved or having contracts with District No. 9, International Association of Machinists.

Article VIII, section 2 of the contract defines a "grievance" as "a dispute or difference involving the application or interpretation of any provision of this Agreement," and establishes a two-step procedure for its attempted adjustment (J.A. 24). Article VIII, section 3 then provides that (J.A. 24):

If such grievances are not thus satisfactorily adjusted, or if the Employer has a grievance, the same shall be referred to a committee for mediation consisting of three representatives of the Union and three representatives of the Employer, who shall be members of and appointed by the Greater St. Louis Automotive Association, Inc., and who are parties to a like Agreement. However, upon formal application for this committee to act, the said committee for mediation must render their decision within fifteen (15) days from official notice BY CERTIFIED OR REGISTERED MAIL unless an extension is mutually agreed to by both parties.

Thereafter, on September 14, 1959, effective November 13, 1959, section 8(e) of the Act was passed making it an unfair labor practice for an employer and a union "to enter into" any contract or agreement prohibited by its terms, with the specific qualification that section 8(e) shall not be "deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto" (supra, pp. 2-3).

About October 6, 1960, the Union wrote the Car Dealers Association requesting mediation under the terms of the contract of alleged violations by Gene Jantzen Chevrolet Company of Article XXIX pertaining to subcontracting of work (J.A. 18). About October 26, 1960, a mediation panel consisting of three representatives of the Union and three

representatives of the Car Dealers Association met pursuant to this request (J.A. 19). At the meeting the Union alleged that Gene Jantzen Chevrolet Company was violating Article XXIX by failing to give preference to subcontractors having contracts with the Union in the subcontracting of auto trim work to members of the Trimmers Association¹ (J.A. 19). The Union requested the mediation panel to find that Gene Jantzen Chevrolet Company had thereby breached Article XXIX and to instruct its members that they are obliged to comply with its terms (J.A. 19). About November 2, 1960, the mediation panel decided that Article XXIX was binding upon all members of the Car Dealers Association (J.A. 19).

B. The Board's Conclusions.

1. The Board found that Article XXIX was an agreement prohibited by Section 8(e) of the Act. Its reasons to support this conclusion are that (J.A. 9):

The contract clause which prohibits, limits or restricts subcontracting of work ordinarily performed by employees in the unit covered by the contract is fairly common in modern collective bargaining agreements. Generally, the purpose and object of such restrictions is to preserve the jobs and job rights of the employees in the unit covered by the contract. We do not in this case decide whether such contract clauses are lawful or unlawful. However, Article XXIX is more than a restriction on subcontracting for the preservation of jobs and job rights of employees. Article XXIX allows subcontracting of work ordinarily performed by employees covered by the contract. It limits the persons with whom the employer can do business. We see no meaningful distinction between a

¹ The Trimmers Association, fully titled the Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc., is an employer association consisting of some ten member companies formed for the purpose of collective bargaining for its members. These members have their premises located in St. Louis, Missouri, and are engaged in the fabrication, installation, and sale of automotive seat covers, convertible tops, and upholstery trim for automotive dealers and for individual customers (J.A. 17).

contract which prohibits an employer from handling products produced by a nonunion firm and a contract which causes an employer to cease subcontracting work to a non-union firm. Both clearly contravene Section 8(e). We find, therefore, that Article XXIX, as written, construed and given effect by the parties, was intended to cause a cessation of business between the Car Dealers Association and its members and members of the Trimmers Association who were not parties to a contract with the Respondent, and hence falls within the proscriptive purview of Section 8(e) of the Act.

2. A sharply divided Board concluded, two members dissenting, that the decision of the mediation panel constituted entry into an agreement by the Union and the Car Dealers Association within the meaning of section 8(e). Although the majority of the Board recognized that "No unfair labor practice arises under section 8(e) unless a labor organization and an employer 'enter into' a proscribed contract" (J.A. 10), and although it further recognized that Article XXIX was entered into as of August 15, 1959, and section 8(e) did not become effective until November 13, 1959 (J.A. 10), it nevertheless concluded that "the . . . Union and the Car Dealers Association did 'enter into' an agreement on November 2, 1960, which incorporated Article XXIX, and by so doing violated Section 8(e) of the Act" (J.A. 11, emphasis supplied). The finding of entry into Article XXIX on November 2, 1960, was premised on the Board's view that, by the decision of the mediation panel on that date, the "parties maintained, reaffirmed, and gave effect to Article XXIX thereby becoming bound by it" (J.A. 11). The two dissenting members expressed their inability to find that the Union "has entered into (as distinguished from attempted to enforce) the alleged 8(e) contract under consideration here" (J.A. 14).

STATEMENT OF POINTS

1. The decision of the mediation panel did not constitute entry into an agreement by the Union and the Car Dealers Association within the meaning of section 8(e) of the Act.

2. Article XXIX is not an agreement prohibited by section (e) of the Act.

SUMMARY OF ARGUMENT

I. To "enter into" an agreement proscribed by its terms is the only unfair labor practice prohibited by section 8(e). The statute bars retroactive application to convert into an unfair labor practice entry into an agreement which antedated the effective date of section 8(e). In this case, the agreement allegedly violative of section 8(e) was entered into before its effective date, and hence no unfair labor practice can be predicated on entry into it. To avoid this plain result, the Board reads "to enter into" an agreement to embrace "maintaining, giving effect to, or enforcing" it. This is a gross shift in meaning. Observance, performance, or enforcement is the consequence, not the act, of entry into an agreement. Section 8(e) on its face distinguishes between entry into an agreement and enforcement of it. So do other provisions of the statute, as do judicial decisions interpreting it. Finally, Congress has treated the question of enforcement of an agreement, as distinct from entry into it, by a separate and complementary statutory route. Section 8(b)(4)(B) prohibits a union from engaging in strikes, strike inducements, threats, restraint or coercion to require observance of an agreement prohibited by section 8(e), for the cessation of business which section 8(b)(4)(B) forbids a union from compelling by the defined pressure is the same cessation of business which section 8(e) prohibits a union and an employer from entering into a contract to secure. Expansion of the words "to enter into" to include "maintaining, giving effect to, or enforcing" thus offends ordinary usage, distorts statutory text and context, and serves no purpose.

II. The validity of an agreement conditioning leave to contract out work to employers who operate under an agreement with the Union or are approved by it depends on the validity of an agreement which absolutely prohibits contracting out of work. Although pretermitted in this case, the Board has since decided that an agreement confiding the performance of

defined work exclusively to the employees covered by the agreement, and hence absolutely prohibiting the contracting out of that work, is not prohibited by section 8(e). Ohio Valley Carpenters District Council, 136 NLRB No. 89, sl. op. pp. 10-12, 16, 49 LRRM 1908. The conditional leave exemplified by the agreement in this case is a lesser included part of the absolute prohibition and consistent in purpose with it. The operative reach of the agreement is confined to "work . . . that comes under the jurisdiction of the Union and this contract . . ." The jurisdictional provision of the agreement enumerates the jobs within the contract unit and inferentially defines the work as that falling within the content of these jobs. It is therefore work within the coverage of the contract to which the agreement relates. The agreement authorizes the employer to "send . . . out" this work whenever he "finds it feasible . . ." It thus commits to the employer's discretion the determination whether to retain the work within the unit or contract it out and thereby serves the employer's interest in flexibility. The agreement cabins the exercise of this discretion by confining the letting of work "to such shop or subcontractors approved or having contracts with" the Union. It thus serves the Union's interest in being assured that the employer will contract out work only for reasons of efficiency and not because it is cheaper to do the work through another whose costs are lower because his employment standards are lower. For approval by the Union or a contract with it guarantees that the subcontractor to whom the work is let operates under labor standards commensurate with those which prevail with the employer who is contracting out the work. Since the labor standards are commensurate at both establishments, the employer has no incentive to contract out work to profit from cheaper labor standards prevailing elsewhere, with the result that contracting out will take place only when it genuinely contributes to greater efficiency. Thus the agreement meshes the employer's interest in flexibility with the Union's interest in maximizing the work and safeguarding the standards for which the Union has contracted. And this compromise unquestionably results in a legal covenant. For an agreement between an employer and

a union could validly prohibit any contracting out of work. "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." Davis v. Massachusetts, 167 U.S. 43, 48.

ARGUMENT

I. THE UNION AND THE CAR DEALERS ASSOCIATION DID NOT "ENTER INTO" AN AGREEMENT BY THE DECISION OF THE MEDIATION PANEL THAT ARTICLE XXIX WAS BINDING UPON ALL MEMBERS OF THE ASSOCIATION

Article XXIX of the contract, found by the Board to be prohibited by section 8(e) of the Act, was part of the overall standard automotive agreement entered into on August 15, 1959, before the enactment of section 8(e). The Board recognizes that "No unfair labor practice arises under Section 8(e) unless a labor organization and an employer 'enter into' a proscribed contract" (J.A. 10). It is also undisputed that the statute in terms precludes retroactive application so as to convert into an unfair labor practice entry into an agreement which took place before the passage of section 8(e) (supra, p. 3). Since Article XXIX was entered into before the enactment of section 8(e) and retroactive application is forbidden, there has been no prohibited entry into an agreement within the purview of section 8(e). And that is the beginning and the end of this case.

The Board finds, however, that the Union and the Car Dealers Association "did 'enter into' an agreement on November 2, 1960," after section 8(e) had become effective, in reliance upon the decision rendered on that date by the mediation panel that "Article XXIX was binding upon all members of the Car Dealers Association" (J.A. 11). According to the Board, by this decision, the "parties maintained, reaffirmed and gave effect to Article XXIX thereby becoming bound by it" (J.A. 11). The Board's meaning is plainly disclosed in its conclusions of law stating that "By reaffirming, maintaining, and giving effect to" Article XXIX, the "Union violated Section 8(e) of the Act" (J.A. 12), and in its order requiring that

the Union cease and desist from "maintaining, giving effect to, or enforcing" Article XXIX (J.A. 13).

To read "to enter into" an agreement to embrace "maintaining, giving effect to, or enforcing" it is a gross shift in meaning. Observance, performance, or enforcement of an agreement is not entry into it. The mediation panel was convened pursuant to the contractual procedure for the adjustment of "a dispute or difference involving the application or interpretation of any provision of this Agreement" (J.A. 18-19, 21, 24). The Union's claim that Gene Jantzen Chevrolet Company was violating Article XXIX was at the Union's instance in accordance with the agreement "referred to a committee for mediation consisting of three representatives of the Union and three representatives of the Employers . . ." (*ibid.*). Before the mediation panel the Union requested that the panel find that Gene Jantzen Chevrolet Company had breached Article XXIX and to instruct members of the Car Dealers Association that they are obliged to comply with its terms (J.A. 19). The mediation panel thereafter unanimously decided that Article XXIX was binding upon all members of the Car Dealers Association (J.A. 19).

This was plainly a procedure to enforce an agreement, not to enter into one. The mediation panel was convened, and its decision was designed, to give effect to a pre-existing obligation, not to incur a new one. It functioned to secure observance of an agreement, not to create terms. It decreed compliance with Article XXIX; it did not bring Article XXIX into being.²

² The Board's opinion appears to make the following argument: to enter into an agreement is to become bound by it; when section 8(e) became effective, Article XXIX was rendered null and void by operation of law, and therefore the parties were no longer bound by it; the decision of the mediation panel, by again binding the parties to Article XXIX, constituted a new entry into the agreement by the parties (J.A. 11). The argument is casuistic in the extreme. If "bound" means an obligation recognized as valid by law, and if Article XXIX is invalid under the terms of section 8(e), then the decision of the mediation panel "bound" the parties to nothing, and it could not therefore on the Board's hypothesis constitute entry into an agreement. On the other hand, if "bound" means the parties' assent to an undertaking independently of its legal validity, then the parties "bound" themselves to

(continued on next page)

It therefore cannot sensibly be said that by the decision of the mediation panel the Union and the Car Dealers Association "did 'enter into' an agreement . . ." (J.A. 11). To enter into an agreement is to manifest mutual assent to new terms. It is the process variously called forming, making, reaching, or consummating an agreement. It is analytically and functionally different from observing, performing, or enforcing an agreement. Observance, performance, or enforcement is the consequence, not the act, of entry into an agreement. For the Board to say that by "reaffirming, maintaining and giving effect to" Article XXIX the parties entered into it is thus to confound adherence to an undertaking with assumption of it. And there is added incongruity in the Board's equation of the decision of the mediation panel with "an agreement" of the parties (J.A. 11). This is like saying that the judgment of a court or the award of an arbitrator is an agreement of the disputants.

Recognizing the oddity of its interpretation and its departure from accepted usage, the Board states that "we do not believe that the words 'to enter into' as used in Sections 8(e) and 8(b)(4)(A) were intended to have the restrictive meaning of similar phrases in, for example, contract or real property law." Los Angeles Mailers Union No. 9, 135 NLRB No. 107, 49 LRRM 1659, 1661.³ But attribution of a special and esoteric meaning to the words "to enter into" is refuted on the face of the statute itself. Section 8(e) in terms distinguishes entry into an agreement from enforcement of it. It first states that "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement" of the proscribed kind, and then provides that "any contract

² (continued from preceding page)

Article XXIX before section 8(e) became effective, and the decision of the mediation panel did not bind the parties to a new commitment but attempted to enforce a pre-existing one. What the Board's argument does is to use the word "bound" in the first sense to deprive Article XXIX of its efficacy as an undertaking, and to use "bound" in the second sense to impart efficacy to the decision of the mediation panel. But a sound argument cannot run in opposite directions at the same time.

³ Pending on petition for review before this Court, sub nom., Los Angeles Mailers Union No. 9 v. N.L.R.B., No. 16,887.

or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." Entry and enforcement are thus separately treated in the very opening sentence of section 8(e). To adopt the Board's reading requires disregard of this express differentiation and transforms section 8(e) into a prohibition making it "an unfair labor practice for any labor organization and any employer to enter into or enforce any contract or agreement . . ." Furthermore, the second proviso to section 8(e) excepts the apparel and clothing industry from the operation of "subsection (e) and section 8(b)(4)(B)," and the concluding sentence of this exemption states that "nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." It is thus plain on the face of section 8(e) that Congress knows how to use the word "enforce" when that is the thought it wants to express.

Other provisions of the statute show that Congress knows how to conjoin entry into an agreement with observance, performance or enforcement of it when that is its purpose. Section 14(b) states that "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." In 1947, when Congress prohibited the closed shop agreement, the saving provision of section 102 specified in part that "the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act . . ." The procedure for conciliation established by Title II of the Labor Management Relations Act, 1947, speaks of the advancement of the procedure "to reach and maintain agreements" (sec. 201(b)) and "to make and maintain agreements" (sec. 204(a)(1)).

Clearly then the difference between entry into an agreement and observance, performance or enforcement of it is as indigenous to the

statute as it is to "contract or real property law." Applying conventional contract principles, the Court of Appeals for the Second Circuit has held that an employer did "enter into" an agreement, although he had not signed it, by conduct manifesting assent to its terms. Rabouin v. N.L.R.B., 195 F. 2d 906, 909-910 (C.A. 2), affirming, 87 NLRB 972, 973-975. Distinguishing between entry into and enforcement of an agreement is at the heart of the Supreme Court's decision in Local Lodge No. 1424 v. N.L.R.B., 362 U.S. 411, in which the Court interpreted the requirement of section 10(b) of the Act that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. The Supreme Court held that a complaint was time-barred that attacked the legality of an agreement, valid on its face but invalid at inception, when the charge was filed more than six months after the initial entry into the agreement. It concluded that "the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." 362 U.S. at 423.

Expansion of the words "to enter into" to include "maintaining, giving effect to, or enforcing" thus distorts statutory text and context and offends ordinary usage. And to no purpose. For Congress has treated the question of enforcement of an agreement prohibited by section 8(e), as distinguished from entry into it, by a separate and complementary statutory route. As we show in detail later (infra, pp. 29-31) and as the Board implicitly recognizes (Los Angeles Mailers Union No. 9, 135 NLRB No. 107, 49 LRRM 1659, 1661), section 8(b)(4)(B) of the Act is the precise counterpart of section 8(e). Section 8(b)(4)(B) prohibits a union from (1) engaging in or inducing a strike or refusal to work, or (2) threatening, coercing, or restraining any person, where an object is "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . ." This cessation of business which section 8(b)(4)(B) forbids a union from

compelling by the defined pressure is the same cessation of business which section 8(e) prohibits a union and an employer from entering into a contract to secure. Consequently, a union violates section 8(b)(4)(B) if it attempts to require observance of an agreement prohibited by section 8(e) by recourse to strikes, strike inducements, threats, restraint or coercion, for this pressure directed to this end seeks accomplishment of the identical object that section 8(b)(4)(B) prohibits.

The statutory scheme is thus clear. Section 8(e) prohibits as an unfair labor practice entry into the proscribed agreement; section 8(b)(4)(B) prohibits as an unfair labor practice enforcement of the proscribed agreement by recourse to the defined pressure. And outlawry of this pressure devitalizes effective enforcement of the type of agreement that section 8(e) bans. As this Court observed, before the enactment of section 8(e) but with reference to the kind of agreement now forbidden by section 8(e), prohibition of a strike or its inducement to enforce such an agreement "would in practical effect render nugatory the clause itself", for any other remedies are "totally inadequate." General Drivers, Local 886 v. N.L.R.B., 101 App. D.C. 80, 247 F. 2d 71, 74, reversed on other grounds, 357 U.S. 93. Accordingly, section 8(e) in combination with section 8(b)(4)(B) effectively reaches both entry into and enforcement of the proscribed agreement.

This reading of the statutory scheme precisely fits the history of the enactment of section 8(e). As we show in detail later (*infra*, pp.31-39), section 8(e) is aimed at the so-called hot cargo agreement, and the beginning point of the history of section 8(e) is the Supreme Court's decision dealing with the hot cargo agreement in Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93. The Supreme Court held that a secondary boycott was not privileged by an employer's promise in advance of the event that it would not do business with another employer if and when in the future a union had a dispute with that other employer. The contracting employer was free to observe his promise, but if he chose not to, the union could not strike or picket him to enforce it. Thus, voluntary observance of the promise was sanctioned but not coercive enforcement of

it if willing adherence was withheld. Id. at 106-108. In addition, the Supreme Court noted that "There is no occasion to consider the invalidity of hot cargo provisions as such" (id. at 107), and it declined to say that "it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties" (id. at 108).

Congress in section 8(e) closed the door which the Supreme Court's decision left slightly ajar. Coercive enforcement of the agreement having already been prohibited as an unfair labor practice, the corollary was to forbid entry into the agreement as an unfair labor practice. This served to remove the hot cargo agreement altogether from the trading area of the bargaining table. It also served to invalidate the hot cargo agreement "as such," a matter which the Supreme Court had stated it had "no occasion to consider" (id. at 107). Invalidation "as such" was further accomplished by the additional provision of section 8(e) rendering "unenforcible and void" any hot cargo agreement "entered into heretofore or hereafter . . ." The "unenforcible and void" edict also nullified the possibility left open by the Supreme Court that the hot cargo agreement might, "in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties" (id. at 108). This reservation had been interpreted as suggesting that a hot cargo agreement might be open to enforcement via an action for damages or specific enforcement. 105 Cong. Rec. 3951-52 (Senator McClellan), 105 Daily Cong. Rec. A 8359 (Sept. 24, 1959, Senator Goldwater), A. 8523 (Oct. 2, 1959, Senator Goldwater), in 2 Leg. Hist. LMRDA 1007, 1829, 1857. The "unenforcible and void" edict eliminated this possible avenue of redress and thus dissipated whatever evanescent "legal radiation"

might still have been thought to linger.⁴

One final element is necessary to complete the statutory picture. Before the 1959 amendments, it was settled that "A boycott voluntarily engaged in by a secondary employer . . . is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott . . ." Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 98-99; Carpenters District Council v. N.L.R.B., 107 U.S. App. D.C. 61, 274 F. 2d 564, 565. This remains the law still and designedly so. N.L.R.B. v. Local 294, Teamsters Union, 49 LRRM 2315, 2316-17 (C.A. 2, Dec. 26, 1961), enforcing, 131 NLRB No. 42, sl. op. pp. 5-10; Local Union No. 505, Teamsters Union (Carolina Lumber Co.), 130 NLRB 1438; Alpert v. Excavating and Building Materials Union, 184 F. Supp. 448 (D.C. Mass.); Little v. Local 481, I.B.E.W., 50 LRRM 2141 (D.C. S.D. Ind.). Persuasion to boycott another employer may, now as before, be directed at "corporate officers, high-ranking supervisors and others 'high up the management ladder.' . . . In other words, inducements and

⁴ A caveat is in order. There is no doubt that an agreement prohibited by section 8(e) is "unenforceable and void," but there may well be doubt whether an agreement claimed to offend section 8(e) does not in fact violate its terms. In a proceeding to enforce an agreement before a court or arbitrator, the defense may be that the agreement is prohibited by section 8(e) and hence "unenforceable and void." Unless the invalidity of the agreement has already been authoritatively determined by the Board or perhaps where its invalidity is clear beyond rational question, it may be that the court or arbitrator should decline to entertain the defense or at least require preliminary recourse to the Board to determine that question. Otherwise the court or arbitrator is in the impermissible business of adjudicating the existence of an unfair labor practice. Compare, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, holding that "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ."; e.g., Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 496-500; S.S.W., Inc. v. Air Transport Assn. of America, 89 U.S. App. D.C. 273, 191 F.2d 658, exemplifying the doctrine of primary jurisdiction whereby exercise of jurisdiction is declined or deferred in favor of the agency's preliminary determination of a question entrusted to its competence; Retail Clerks International Association v. Lion Dry Goods, Inc., 369 U.S. 17, 29, observing that, "if the federal courts' jurisdiction under § 301(a) required a preliminary determination [by the court] of the representative status of the labor organizations involved, potential conflict with the National Labor Relations Board would be increased, . . . and litigation would be much hindered."

encouragements addressed to management will not suffice to establish an unfair labor practice in the area of secondary boycotts; threats, coercion or restraints are necessary." N.L.R.B. v. Local 294, Teamsters Union, 49 LRRM 2315, 2316-17 (C.A. 2, Dec. 26, 1961). " . . . Congress had no intention of preventing a union or its representatives from addressing noncoercive pleas to employers or to individuals who had authority in behalf of the employer to make and terminate contracts." Alpert v. Excavating and Building Materials Union, 184 F. Supp. 558, 561 (D.C. Mass.).

Accordingly, contrary to the Board's position (Los Angeles Mailers Union No. 9, 135 NLRB No. 107, 49 LRRM 1659), viewing the statutory scheme as a whole, distortion of the plain meaning of the words "to enter into" an agreement cannot be justified as necessary to prevent presumed defeat of the purpose behind section 8(e). Entry into the proscribed agreement is forbidden as an unfair labor practice; coercive enforcement of the agreement by recourse to strikes, strike inducements, threats, restraint or coercion is forbidden as an unfair labor practice; and the agreement is otherwise "unenforcible and void." The proscribed agreement is thus completely extinct as a viable basis of legal compulsion. At the other end of the spectrum, a union remains free to persuade an employer to boycott another; in harmony with this freedom to persuade, concurrence by an employer in the noncoercive request of a union to boycott another, in the absence of a commitment by the employer to adhere to that concurrence, cannot constitute a proscribed contract or agreement, express or implied.

The only "gap" in the statutory scheme which the Board conjures is that an employer and a union may enter into a proscribed agreement; more than six months may elapse without the filing of an unfair labor practice charge so that a complaint attacking entry into the agreement is time-barred; and thereafter, without recourse to strikes, strike inducements, threats, restraint, or coercion, "a union persuades the employer to live up to such arrangement . . ." Los Angeles Mailers Union No. 9, 135 NLRB No. 107, 49 LRRM 1659, 1661 (emphasis supplied). But persuasion of an employer to boycott another is not an unfair labor practice.

And persuasion which is not an unfair labor practice in the absence of an agreement does not become an unfair labor practice because of the presence of an agreement. Whether entry into the agreement as an unfair labor practice is or is not time-barred is beside the point. Even if not time-barred, the act of persuasion is not an unfair labor practice proscribed by section 8(e). Nor is persuasion an unfair labor practice proscribed by any other provision of the Act. Thus the Board's distortion of the words "to enter into" to reach persuasion does not fulfill but goes beyond the purpose of section 8(e). And to go beyond the statutory purpose is to defeat it just as surely as to fall short of its mark. It bears "remembering that the 'policy' of any law may inhere as much in its limits as in its extent."⁵

The Board's leap beyond the statute is especially revealed by the "gap" it purports to fill in this case. The Board states that the words "to enter into" must be expanded to include an agreement "executed prior to the effective date . . . but . . . reaffirmed, maintained or given effect after the effective date," for otherwise the statutory prohibition against retroactive application would prevent reaching the agreement as an unfair labor practice via section 8(e) (J.A. 10-11). But Congress chose not to give section 8(e) this retroactive application, and section 8(e) cannot be interpreted more broadly than it reads in reliance upon a consequence of that very choice. Congress made the choice. The Board cannot avoid it because it does not like the result.

In any case, it surely must be said that whether the "gaps" which the Board sees are more than mirages, so as cogently to justify a claim that adherence to plain meaning would defeat purpose, is problematical at best. Furthermore, the segment of activity which the Board identifies is so marginal in relationship to the overall acknowledged reach of the statute that its existence is minimal in effect and its ban unnecessary to

⁵ Hand, L., *The Spirit of Liberty*, 164 (Dilliard ed., Vintage Books, 1959). See also, Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 99-100.

realization of the main thrust of the statutory objective. In these circumstances following the plain meaning does not lead to "absurd or futile results" or produce "an unreasonable one 'plainly at variance with the policy of the legislation as a whole . . .'" United States v. American Trucking Associations, 310 U.S. 534, 543. The plain meaning is therefore entitled to prevail. Bonnaz v. N.L.R.B., 97 U.S. App. D.C. 234, 230 F. 2d 47. "A firmly established principle of statutory interpretation is that 'the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses.'" Hanover Bank v. Commissioner, 30 U.S. Law Week 4385, 4390 (S. Ct., May 21, 1962). "After all, Congress expresses its purpose by words" (62 Cases v. United States, 340 U.S. 593, 596), and when words have a clear meaning adherence to that meaning assures fidelity to the statute. Accordingly, giving the words "to enter into" an agreement their normal meaning, entry into the allegedly invalid agreement in this case took place before the enactment of section 8(e), not during its effective period, and hence there has been no violation of section 8(e).

- II. SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT PROHIBIT AN AGREEMENT PROVIDING THAT, "WHENEVER THE EMPLOYER FINDS IT FEASIBLE TO SEND WORK OUT THAT COMES UNDER THE JURISDICTION OF THE UNION AND THIS CONTRACT, PREFERENCE MUST BE GIVEN TO SUCH SHOP OR SUBCONTRACTORS APPROVED OR HAVING CONTRACTS WITH DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS."

A. Introduction.

The Board finds that section 8(e) of the Act forbids an agreement by which the employer covenants that, "Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists." In reaching this conclusion, the Board pretermits consideration of the legality of an agreement which commits the performance of the work exclusively to the employees covered by the agreement, and,

correlatively, prohibits the employer from contracting with another to do that work. Thus the Board states that (J.A. 9):

The contract clause which prohibits, limits or restricts subcontracting of work ordinarily performed by employees in the unit covered by the contract is fairly common in modern collective bargaining agreements. Generally, the purpose and object of such restrictions is to preserve the jobs and job rights of the employees in the unit covered by the contract. We do not in this case decide whether such contract clauses are lawful or unlawful.

The question which the Board pretermits is at the heart of this case. For the legality of an agreement which absolutely prohibits contracting out of work is the foundation of the legality of an agreement which conditions but does not prohibit the contracting out of work. As the Board states, the absolute prohibition is designed "to preserve the job and job rights of the employees in the unit covered by the agreement" (J.A. 9). Conditional leave to contract out work serves the same purpose. An employer may object to the absolute prohibition on the ground that it impairs the flexibility of his operations too severely. A union may be willing to accommodate an employer's interest in flexibility if it is assured that the employer will contract out work only for reasons of efficiency and not because it is cheaper to do the work through another whose costs are lower because his employment standards are lower. The employer's interest in flexibility and the union's interest in preventing contracting-out from being perverted into a means of undercutting the work and standards established by the agreement are meshed by confining the letting of work "to such shop or subcontractors approved or having contracts with" the union. Approval by the union or a contract with it guarantees that the subcontractor to whom the work is let operates under labor standards commensurate with those which prevail with the employer who is contracting out the work. Since the labor standards are commensurate at both establishments, there is no incentive to contract out work to profit from cheaper labor standards prevailing elsewhere, with the result that contracting-out will take place only when it genuinely contributes to greater efficiency. The arrangement serves the

union's interest in maximizing the work opportunities of the employees covered by the agreement consistently with the employer's interest in flexibility.

On this analysis the conditional leave to contract out work would be illegal only if the absolute prohibition would also be illegal. For conditional leave is a lesser included part of, and consistent in purpose with, absolute prohibition. "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." Davis v. Massachusetts, 167 U.S. 43, 48. Non debet cui plus licet, quod minus est non licere.

Since the decision in the instant case, the Board has concluded that an agreement confiding the performance of defined work exclusively to the employees covered by the agreement, and hence absolutely prohibiting the contracting out of that work, is not prohibited by section 8(e). Ohio Valley Carpenters District Council, 136 NLRB No. 89, sl. op. pp. 10-12, 16, 49 LRRM 1908. This case is nevertheless in the unfortunate posture that the major premise for decision is one to which the Board had not committed itself at the time of decision but deliberately left undetermined.⁶ The soundness of this major premise and the considerations which enter into are crucial to this case. Accordingly, we shall show, first, that an absolute prohibition against contracting out work is valid, and, second, that the validity of conditional leave to contract out work as exemplified by the agreement in this case follows as a matter of course from the validity of the absolute prohibition.

B. Precis of the Difference Between a Work Preemption Agreement and a Hot Cargo Agreement.

Analysis begins with identifying the difference between a work preemption agreement, which is not prohibited by section 8(e) of the Act, and

⁶ Cf. S.E.C. v. Chenery Corp., 318 U.S. 80, 87, and s.c. 332 U.S. 194, 196-197; N.L.R.B. v. Capital Transit Co., 95 App. D.C. 310, 221 F.2d 864, 867; Carpenters District Council v. N.L.R.B., 107 App. D.C. 55, 274 F.2d 564, 565, n.3; Braniff Airways, Inc. v. C.A.B., C.A.D.C. No. 16499, sl. op. pp. 7-8, decided May 24, 1962.

a hot cargo agreement, which is prohibited by it. A work preemption agreement defines the work which shall be exclusively performed by the employees covered by the agreement; by requiring the work to be done by the employer's own employees it prohibits subcontracting that work to others. Such an agreement is variously known as a "work jurisdiction," "work assignment," or "no subcontracting" agreement.

A work preemption agreement is conventional and common. "Exclusive assignment of particular work functions to a certain class of employees or bargaining unit is a typical and widespread provision of union-management agreements . . ." Long Island News Corp., 35 LA 840, 844.⁷ The reports of the Board are replete with illustrations.⁸ The consequence of the contractual assignment of work to a class of employees is that the work may not be performed by any others. It may not be performed by supervisors; it may not be performed by other rank-and-file employees of the same employer; and it may not through subcontracting be performed by the employees of other employers or by self-employed persons. As the Board has stated, the employer "may not evade this work assignment by transferring the work from one enterprise to another." Local No. 48, Sheet Metal Workers International Association, 119 NLRB 287, 291.

⁷ "LA" refers to Labor Arbitration Reports published by the Bureau of National Affairs, Inc.

⁸ "The jurisdiction of stage electricians covers the maintenance, repair, placement and operation of spotlights and other lighting devices used to light the set in connection with such television performances." National Association of Broadcast Engineers and Technicians, 103 NLRB 479, 486. "Only employees under this agreement shall operate technical equipment. . . ." National Association of Broadcast Engineers and Technicians, 105 NLRB 355, 360. "The work covered by this Agreement shall include all of the following work. . . ." Radio & Television Broadcast Engineers Union, Local 1212, 114 NLRB 1354, 1356. " . . . [A]ll sheet metal work shall be done by employees who are journeymen sheet metal workers or registered apprentices." Local No. 48, Sheet Metal Workers International Association, 119 NLRB 287, 291. The agreement "is meant to cover the loading and unloading of railroad cars, trucks, teams, lights, barges, transferring freight in and out of storage places, sorting, piling and other miscellaneous work not performed by members of the Deepsea and Coastwise locals." International Longshoremen's Association, 127 NLRB 35, 36.

A work preemption agreement is wholly different from the hot cargo agreement prohibited by section 8(e). A hot cargo agreement requires the contracting employer to cease doing business with another person who is in the union's disfavor because of a labor dispute or other objectionable employment condition prevailing at that person's establishment. The cessation of business is designed to further the union side of the dispute or to protest the objectionable condition. A work preemption agreement, on the one hand, and a hot cargo agreement, on the other, have in common only the happenstance that the consequence of each may be that the contracting employer may refrain from or cease doing business with another person. But the reasons behind the consequence are so different that the prohibition of the hot cargo agreement does not invalidate the work preemption agreement. As explained by Archibald Cox, a "close student of our national labor relations laws"⁹ and now Solicitor General of the United States, the "restriction upon subcontracting seeks to protect the wages and job opportunities of the employees covered by the contract by forbidding the primary employer to have work which his employees might do, performed outside his own shop -- something quite different in both purpose and effect from arranging to have secondary employers boycott non-union firms or specified employers or groups of employers because their products or labor policies are objectionable to the union." Cox, Law and the National Labor Policy, 34 (1960). See also, Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1118-19 (1960). The General Counsel of the Board has similarly observed that:¹⁰

Collective bargaining agreements frequently contain provisions which prohibit employes from subcontracting work which is normally done within the bargaining unit. * * * A commitment not to subcontract work would seem to be an agreement not to do business with subcontractors. * * * Clauses of this character, however, are not precisely in the same vein as the kind of "hot

⁹ N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 489.

¹⁰ Address, The Law And Secondary Boycotts In Perspective, delivered before the Institute on Labor-Management Reporting and Disclosure Act of 1959, Emory University School of Law, The Lawyers Club of Atlanta, Atlanta, Georgia, Feb. 12, 1960, pp. 17-18.

cargo" provision which was much litigated under the Taft-Hartley Act, and which apparently prompted enactment of Section 8(e). The situation in which the usual "hot cargo" clause is invoked involves a dispute with one employer, and an effort to prevent the handling of his products by the employees of another employer who is neutral to the dispute. This is a typical secondary boycott situation. The purpose of the union which wins a subcontracting clause, however, is simply to retain the work ordinarily done in the plant for the employees it represents; it has no dispute with any particular subcontractor. A dispute under a subcontracting clause is in the nature of a primary quarrel as to whether employees in the bargaining unit should be permitted to do particular work.

We now show that the work preemption agreement pertains entirely to safeguarding the employment security of the employees covered by the agreement. It falls within the scope of protected activity and is wholly outside the prohibition of section 8(e) of the Act.

**C. A Work Preemption Provision is Inherent
in a Collective Bargaining Agreement and
Efforts to Obtain It Constitute Protected
Activity.**

The inherently valid character of a work preemption agreement is manifest upon consideration of a common and recurrent dispute between employers and unions. The dispute relates to the employer's engagement of independent outside contractors to do work which has been or can be done by the employer's own employees where the collective bargaining agreement is silent upon the subject. The employer typically contends that in the absence of an express prohibition in the agreement it is free to contract work to others, while the union maintains that the agreement contains an implied covenant against divesting the unit of employees of work it is capable of performing.

There is a growing body of significant and probably preponderant thinking that, despite the absence of an explicit contractual restriction, implicit in the very being of an agreement is a limitation against subcontracting to others work which the employees covered by the agreement can do. "To allow the Company, after signing an agreement covering standards of wages and conditions for . . . jobs and employees, to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the

Contract and destroy the meaning of the collective bargaining relation."¹¹ This Court has given judicial confirmation to this view (Retail Clerks Union Local 770 v. N.L.R.B., 296 F. 2d 368, 373):

The tacit but essential premise of a bargaining agreement is that the employer employs the employee to do certain work. When he agrees in good faith to terms and conditions, he represents that if the employees accept and abide those terms and conditions they will have this employment. We think employees, even absent a specific anti-subcontracting provision, could enforce the right to work contemplated by a bargaining agreement.¹²

The Court of Appeals for the Seventh Circuit has reached the same conclusion, holding that, despite the absence of a specific contractual restriction, an employer violated its collective bargaining agreement with a union by contracting with an outside independent contractor for the performance of office janitorial work formerly performed by employees within the unit. It explained that, "If this small group can be thus replaced, then other groups could meet the same fate, and eventually it would be possible to deplete a major part of the 'protected' union shop force. We hold it would be inconsistent with the basic purpose of the agreement to approve the contracting out of the janitorial jobs here involved." UAW, Local 391 v. Webster Electric Co., 299 F. 2d 195, 197 (C.A. 7). And so, without a specific restriction, an implied limitation upon subcontracting work nevertheless arises out of the very nature of a collective

¹¹ A. D. Juilliard Co., Inc., 21 LA 713, 724.

¹² Compare Mr. Justice Brennan's observation, concurring in United Steelworkers v. American Mfg. Co., 363 U.S. 564, 572, that to fail to imply a covenant barring an employer "from contracting out as it pleased . . . would necessarily mean that . . . [it] was free completely to destroy the collective bargaining agreement by contracting out all work."

An Emergency Board created by President Eisenhower, pursuant to Section 10 of the Railway Labor Act, stated, with reference to a proposal by the carriers to assign work to others than those covered by the collective bargaining agreement (In re Akron, Canton & Youngstown R.R. Co., 22 LA 392, 435):

This proposal strikes at the very foundation of collective bargaining agreements, for if the class or craft covered by the agreements is not secure in having the right to perform the work of the Carrier which the agreement provides that they shall have, then they have little security in their employment or in the seniority which results from their performance of the work covered thereby.

bargaining agreement.¹³ An agreement is pointless if the employees covered by it have no work to do.

But whether or not one subscribes to the view that the agreement itself implies limitations upon subcontracting, and without regard to whether the scope of the implied restrictions are narrow or broad, the very existence of this body of responsible thinking conclusively establishes the point relevant to this case. For it shows that, if subcontracting control to protect the jobs of the employees may be fairly implied from the agreement even when it is silent on the subject, subcontracting control may surely be negotiated and expressly written into the agreement. In a word, work jurisdiction or assignment - who shall do the work and conversely to whom the work shall not be subcontracted - is a mandatory subject of collective bargaining.¹⁴ This much

¹³ For a survey of arbitration decisions on the subject, see Celanese Corp., 33 LA 925, 942-948; Square D Co., 37 LA 892, 896-898. For recent illustrations of enforcement of implied limitations upon subcontracting, see Federal-Mogul-Bower Bearings, Inc., 37 LA 867; Mead Paper Co., 37 LA 342; Container Corp., 37 LA 252; Vulcan Rivet & Bolt Corp., 36 LA 871; Socony Mobil Oil Co., 36 LA 631. For interesting examples finding implied limitations following judicial determination of arbitrability, see Warrior & Gulf Navigation Co., 36 LA 695, following United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574; U.S. Potash Co., 37 LA 442, following United States Potash Co. v. Local 1912, International Association of Machinists, 270 F.2d 496 (C.A. 10), cert. denied, 363 U.S. 845. For a narrow statement of the scope of implied limitations, see Reynolds Metals Co., 37 LA 599, 604. For a critical analysis of the role of arbitration in the evolution of subcontracting controls, see Slichter, Healy, and Livernash, The Impact of Collective Bargaining on Management, 308-316 (1960).

¹⁴ For the range of agreements on the subject, see Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 413-415 (1950); Subcontracting Clauses in Major Collective Bargaining Agreements, Bull. No. 1304, Bur. Lab. Stat., Dept. of Lab., (1961). The basic steel agreement of 1962 provides that, upon 90 days' written notice given not earlier than May 1, 1963, the parties may bargain upon, and "shall be free to strike or lock-out in support of their position with respect to," the "contracting out of work which could be performed by bargaining unit employees. . . ." 49 LRR 597, Sec. 19(e), 21. Before then the parties, through their jointly constituted Human Relations Committee, plan to study the matter, explaining that (49 LRR 599):

The Companies have stated that it is their policy and intention to use their employees as much as practicable for work on the properties involved, and to contract out work only when that course is required by sound business considerations. The Union has stated that the Companies have contracted out work which can and should be performed by bargaining unit employees. The Human Relations Committee will study the actual experiences and practices in the field of contracting out to determine what measures are required or desirable to deal with this matter.

the Board has authoritatively held in requiring bargaining on "subcontracting of work" (Timken Roller Bearing Co., 70 NLRB 500, 504),¹⁵ explaining that (id. at 518):

Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the respondent's system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit.

See also, General Tire and Rubber Co., 135 NLRB No. 28, IR sl. op. pp. 3, 4, 5, 6; Town & Country Mfg. Co., 136 NLRB No. 111, 49 LRRM 1918, 1920.

A subject upon which bargaining is mandatory cannot be a subject upon which it is illegal to contract. A contractual commitment defining the work to be exclusively performed by the employees covered by the agreement resulting from obligatory negotiation on work jurisdiction or assignment cannot therefore be invalid. Indeed, notwithstanding the prohibition against "jurisdictional strikes" contained in Section 8(b)(4)(D) of the Act, the Board holds that a union may strike to require an employer to observe the work assignment incorporated in the collective bargaining agreement.¹⁶ As the Board has explained, to "fail to hold as controlling herein the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent."¹⁷ The Board could hardly describe the "contractual preemption of the work" as a "binding obligation" if incorporation of it into an agreement were illegal. Furthermore, to the extent that work jurisdiction or assignment is restricted by

¹⁵ Reversed on other grounds, 161 F.2d 949 (C.A. 6), and cited with approval by the Supreme Court in Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 295.

¹⁶ National Association of Broadcast Engineers, 105 NLRB 355, 363-365; Radio & Television Broadcast Engineers Union, 114 NLRB 1354, 1359; Local No. 48, Sheet Metal Workers, 119 NLRB 287, 291; International Union of Operating Engineers, 121 NLRB 1073, 1076; Local 173, Wood, Wire & Metal Lathers Union, 121 NLRB 1094, 1109, n. 37, 1112, n. 45; International Longshoremen's Association, 127 NLRB 35, 38.

¹⁷ National Association of Broadcast Engineers, 105 NLRB 355, 364.

statute at all, it is regulated solely through Section 8(b)(4)(D) in conjunction with Section 10(k). Section 8(b)(4)(D) prohibits a strike to compel "any employer to assign particular work to employees in a particular labor organization or a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class. . . ." ¹⁸

The upshot is clear. Work preemption provisions are common in collective bargaining agreements. Indeed, intrinsic to an agreement is an implied limitation against subcontracting to others work that the employees covered by the agreement have done or can do. But whatever the scope of implied limitations, contractual preemption of defined work is a subject upon which bargaining is mandatory. If agreement is reached, it results in a binding obligation. Short of Section 8(b)(4)(D), there is no statutory prohibition against striking to secure a commitment confiding the work to the employees covered by the agreement. And, short of a no-strike promise, there is on any hypothesis no statutory prohibition against striking to compel observance of the agreement when secured.

A work preemption agreement is thus altogether within the scope of protected activity. In fact, the Supreme Court has upheld the validity of just such an agreement, stating that it was an "'agreement upon a subject matter as to which federal law directs them to bargain.'" Local 24, Teamsters Union v. Oliver, 362 U.S. 605, 606. As summarized by the Supreme Court, the agreement it sanctioned "provide[d] that hired or leased equipment, if not owner-driver, shall be operated only by employees of the certificated or permitted carriers and require[d] those carriers to use their own available equipment, before hiring any extra equipment." Ibid.

We now show that Congress did not by Section 8(e) undo what it otherwise so carefully preserved.

¹⁸ As to a controversy within the scope of Section 8(b)(4)(D), under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision." N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, 364 U.S. 573, 586. Congress replaced the jurisdictional strike by an impartial determination of which group is entitled to disputed work and not by the employer's unilateral determination of that question.

**D. Section 8(e) of the Act Prohibits Only the
Hot Cargo Agreement, a Type of Agreement
Wholly Different in Terms and Purpose
from a Work Preemption Agreement.**

The claim that section 8(e) of the Act prohibits a work preemption agreement is based on a wholly simplistic reading of the words of that section. The argument runs as follows: section 8(e) prohibits entry into an agreement by which an employer "ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person"; an agreement confiding the performance of defined work to employees covered by it is conversely an agreement to refrain from or cease subcontracting that work to outside persons; it is therefore pro tanto an agreement between an employer and a union by which the employer undertakes not to do business with any other person; ergo it is prohibited.

This relentless literalism does not survive an analysis of the terms, purpose, and history of section 8(e). As the Board has stated, "8(e) cannot be woodenly applied to all situations which the breadth of its language may superficially appear to fit." Ohio Valley Carpenters District Council, 136 NLRB No. 89, sl. op. p. 11, 49 LRRM 1908.

**1. The Terms of Section 8(e) Considered in
the Light of the Cognate Terms Employed
in Section 8(b)(4)(B) Prohibit Only an
Agreement to Sanction a Secondary Boycott -
The "Hot Cargo" Agreement.**

As we have said, section 8(e) prohibits a union and an employer from entering into an agreement:

whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . .

Section 8(b)(4)(B) of the Act (formerly Section 8(b)(4)(A)) prohibits a union from exerting pressure where an object of it is:

forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person

The two quoted clauses are almost literal counterparts. But for the use of the words "handling, using, selling" in section 8(e) as distinguished from the sequence of the same words "using, selling, handling" in section 8(b)(4)(B), and but for the use of the words "in any of the products of any other employer" in section 8(e) as distinguished from the words "in the products of any other producer, processor, or manufacturer" in section 8(b)(4)(B), the two clauses are precisely identical. And the differences have no present relevance if indeed there ever could be a situation where the minute variation would matter.

The words of section 8(b)(4)(B) have an authoritatively settled meaning. "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity." Local 761, International Union of Electrical Workers v. N.L.R.B., 366 U.S. 667, 672. Instead, the "impact of the section was directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'" Id. at 672. "The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott. . . ." International Brotherhood of Electrical Workers v. N.L.R.B., 341 U.S. 694, 705. "At the same time that §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, § 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object is to force an employer or other person to boycott someone else." N.L.R.B. v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 687. It must therefore be interpreted to harmonize "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Id. at 692.

The words in section 8(b)(4)(B) thus prohibit the secondary boycott. The identical words in section 8(e) must therefore prohibit the agreement to sanction a secondary boycott. The same words cannot have a different meaning when employed in 8(e) as when used in 8(b)(4)(B). The secondary boycott is therefore the mischief at which both sections are aimed. And the same literalism which would expand 8(e) beyond that meaning has already been rejected

as to the cognate wording of 8(b)(4)(B).¹⁹

An agreement to confide the performance of defined work solely to the employees covered by it is not an agreement to engage in a secondary boycott. A strike to obtain contractual preemption of the work is not a secondary boycott. We have already shown the exclusively primary character of the controversy (supra, pp.24-28). The dispute is over who shall do the work. The dispute is between the union representing the employees who want the work and their employer who has it within his own power to allocate the work to them. The strike is against the employer to bring him to accede to the union's work demands in precisely the same way as in the case of a strike exclusively over wages which the union requests but the employer refuses to grant. No pressure is exerted against a neutral employer to cause him to exercise his influence on the primary employer in the union's favor. A strike to enforce, and therefore necessarily a strike to secure, contractual preemption of defined work is thus not a secondary boycott. Retail Clerks Union Local 770 v. N.L.R.B., 296 F.2d 368, 373 (C.A.D.C.); Haughton v. Columbia River District Council No. 5, 294 F.2d 766 (C.A. 9); International Longshoremen's Local Union No. 19, 137 NLRB No. 13, 50 LRRM 1091. The agreement is therefore not one prohibited by section 8(e).

2. The Purpose and History of Section 8(e) Confirm That It Prohibits the Hot Cargo Agreement Only.

The purpose and history of section 8(e) confirm the meaning disclosed by its text read in the light of the settled interpretation given the cognate wording of section 8(b)(4)(B). The beginning point of the history of section 8(e) is the Supreme Court's decision in Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93. The Supreme Court held that a secondary boycott was not privileged by an employer's promise in advance of the event that it would not do business with another employer if and when in the future a union had a dispute with that other employer. The contracting employer was free to observe his promise, but if he chose not to, the union could

¹⁹ Local 761, International Union of Electrical Workers v. N.L.R.B., 366 U.S. 667, 672; Seafarers International Union v. N.L.R.B., 265 F.2d 585, 591 (C.A.D.C.); Local No. 24 Teamsters Union v. N.L.R.B., 266 F.2d 675, 680; Local No. 662, Radio and Television Engineers, 133 NLRB No. 165, 49 LRRM 1042, 1045, n. 10.

not strike or picket him to enforce it. As the Supreme Court stated, "if an employer does intend to observe the contract, and does truly sanction and support the boycott, there is no violation of § 8(b)(4)(A)" (*id.* at 107); "Certainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of § 8(b)(4)(A) . . ." (*id.* at 108). On the other hand, if the contracting employer declines to adhere to his promise, he is safeguarded from a strike or its inducement to require him to cease doing business with a primary employer. "[I]nducements of employees that are prohibited under § 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision" (*id.* at 106); "even when there is a contractual provision the union must not appeal to the employees or induce them not to handle the goods" (*id.* at 107). Thus, voluntary observance of the promise was sanctioned but not coercive enforcement of it if willing adherence was withheld. In addition, the Supreme Court noted that "There is no occasion to consider the invalidity of hot cargo provisions as such" (*id.* at 107), and it declined to say that "it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties" (*id.* at 108). Finally, the content of a hot cargo agreement may be discerned in relationship to the hot cargo agreement employed in motor transportation appearing in Genuine Parts Co., 119 NLRB 399, 400, a decision which the Court considered at length in its opinion (357 U.S. at 104, 108-111). The hot cargo agreement in Genuine Parts reads in part that:

It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walkout or lockout exist.

The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business

there is a controversy between such carrier, or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

This was the state of the law as to hot cargo agreements when consideration of the 1959 amendments to the Taft-Hartley Act began. The bill reported by the Senate Labor Committee did not contain any provision dealing with the subject. The minority on the Committee criticized this omission among others. The minority expressed its "intention to offer amendments . . . on the floor of the Senate" (S. Min. Rep. No. 187, 86th Cong., 1st Sess., 72, in 1 Leg. Hist. LMRDA 468), explaining on the subject of hot cargo agreements that (*id.* at 79-80, in 1 Leg. Hist. LMRDA 475-476; see also, 105 Cong. Rec. 5920):

It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call "hot goods," "unfair materials," and "black-listed products." Such clauses have become standard in contracts entered into by the Teamsters Union. Here, employer A, who has a dispute with a union or whose employees are being solicited for union membership, is in real trouble. He may have customers waiting for his product or he may have suppliers eager to send him raw material, but both his delivery of products and supply of raw material cannot move from or to his place of business because the carriers in either instance have "hot cargo" clauses in their contracts with the Teamsters Union. His alternative is the same as in loophole No. 1 - go out of business or yield to the union's demand, which often is a demand for a compulsory membership contract with a union which his employees do not want.

These "hot cargo" contracts have been the subject of much litigation before the Board, the courts, and the Interstate Commerce Commission. A review of these cases leads to the conclusion that while there may be circumstances under which a "hot cargo" contract is not a defense to otherwise unlawful conduct, generally speaking it does provide a large loophole in the ban on secondary boycotts.

S. 748 makes it an unfair labor practice for a union to coerce an employer to enter into such an agreement, or having entered into it, for a union to coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it. Only the latter is now unlawful under the Taft-Hartley Act.

On the Senate floor an amendment was thereafter adopted limited to invalidating hot cargo agreements with motor carriers (105 Cong. Rec. 6556-58, in 2 Leg. Hist. LMRDA 1161-63):

It shall be an unfair labor practice for any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer, or to cease doing business with same.²⁰

Extension of the invalidation to employers other than motor carriers was expressly rejected (*ibid.*).

In the House, the House Labor Committee reported a bill which also limited the invalidation of hot cargo agreements to those entered into with motor carriers. The House bill made it an unfair labor practice for an employer (H. Rep. No. 741, 86th Cong., 1st Sess., 58, in 1 Leg. Hist. LMRDA 816):

who is a common carrier subject to part II of the Interstate Commerce Act, to enter into any contract or agreement, express or implied, with a labor organization whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer, or to cease doing business with same.

And it similarly made it an unfair labor practice for a union (*id.* at 60, in 1 Leg. Hist. LMRDA 818):

to enter into any contract or agreement, express or implied, with any employer who is a common carrier subject to part II of the Interstate Commerce Act, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer, or to cease doing business with same . . .

The House Report stated in explanation of these provisions that (*id.* at 20-21, in 1 Leg. Hist. LMRDA 778-779; see also, *id.* at 51, 80, in 1 Leg. Hist. LMRDA 809, 838):

²⁰ The Senate also adopted an amendment making it a violation of the duty to bargain to inject such a clause into negotiations with motor carriers, and voiding and rendering unenforceable any such clause with a motor carrier either presently existing or to be executed in the future. 105 Cong. Rec. 6730, in 2 Leg. Hist. LMRDA 1242-43.

The committee bill would amend the National Labor Relations Act by outlawing "hot cargo" clauses in labor contracts signed by common carriers subject to part II of the Interstate Commerce Act - i.e., those common carriers who transport goods in interstate commerce. The "hot cargo" clause is one of the oppressive devices used by the Teamsters Union to spread its power. Outlawing this clause in the trucking industry would close a loophole in the present law against secondary boycotts.

The need for additional legislation outlawing the "hot cargo" clause results from a gap in the National Labor Relations Act. Section 8(b)(4)(A) makes it an unfair labor practice for a labor union -

to induce or encourage the employees of any employer to engage in a strike or a concerted refusal * * * to perform any services, where an object thereof is * * * forcing or requiring any employer * * * to cease doing business with any other person * * *

The application of this prohibition is best illustrated by a concrete example. Suppose that company A trucks furniture over the road from terminals in Atlanta, Ga., to Philadelphia and New York and that company B manufactures furniture in Macon, Ga., which is taken to Atlanta and then carried north in A's trucks. If there were a strike at B's factory in Macon, it would be an unfair labor practice under the present law for the union which called the strike to go to Atlanta and induce A's truckdrivers to refuse to handle B's furniture on the ground that it was "hot cargo."

But two essential elements of the present law are the inducement of employees by a labor union and a strike or concerted refusal to perform services. In the example, if the trucking company, A, simply refused to carry B's furniture there would be no unfair labor practice because there was no inducement of employees by the union.

After the Taft-Hartley Act became law the Teamsters Union began to exploit this distinction by the device of "hot cargo" clauses. During negotiations the Teamsters would demand that the trucking firm, A, put a clause into the collective bargaining agreement agreeing generally that A would not truck nor require his employees to handle any freight which was "hot" or "unfair" because it came from an employer engaged in a labor dispute. It would be hard for A to resist this demand. Later the Teamsters could insist that A live up to the contract and refuse to handle freight such as B's furniture.

From B's standpoint it makes no difference whether his furniture cannot be trucked out of Atlanta because the Teamsters induce A's employees to refuse to handle it or because A has been compelled to sign a contract not to handle hot goods. The

injury to the public is also the same. The "hot cargo" clause therefore became a major weakness in the law against secondary boycotts.

Section 707 of the Senate bill sought to correct this weakness by outlawing "hot cargo" clauses. It proposed to amend the National Labor Relations Act by making it an unfair labor practice for a common carrier subject to part II of the Interstate Commerce Act to enter into such a contract with a labor union and by making it an unlawful refusal to bargain for the labor organization to press for such a clause in contract negotiations. The Senate bill would also make existing hot cargo clauses unenforceable. Since section 707 followed the words of NLRA section 8(b)(4)(A) insofar as they could apply to carriers it preserved the established distinction between primary activities and secondary boycotts.

The minority of the House Labor Committee criticized this limited invalidation of the hot cargo agreement. *Id.* at 97, in 1 Leg. Hist. LMRDA 855. On the House floor the House voted a general invalidation of hot cargo agreements. 105 Cong. Rec. 15710, 15859, in 2 Leg. Hist. LMRDA 1691, 15891, in 2 Leg. Hist. LMRDA 1700-01. In conference the Senate managers yielded to the House managers and the prohibition in its present form emerged from conference and was finally enacted. H. Rep. No. 1147, 86th Cong., 1st Sess., 26, 27, 39, in 1 Leg. Hist. LMRDA 943; 105 Cong. Rec. 17899, 17919-20, 18153-54, in 2 Leg. Hist. LMRDA 1432, 1453, 1738-39.

This history does not permit the least doubt that section 8(e) is directed exclusively at agreements sanctioning a secondary boycott. It plainly appears that the identifying attribute of the prohibited agreement is that the neutral contracting employer is required to cease doing business with another person to further a labor dispute or to protest other disfavored employment conditions existing at that other person's establishment. As the concluding sentence of the House Report explained, the generalized language employed in section 8(e) is based on the cognate wording of section 8(b)(4)(A) which is limited to the secondary boycott: "Since section 707 [of the Senate bill, enacting section 8(e) limited to motor carriers, 1 Leg. Hist. LMRDA 582] followed the words of NLRA section 8(b)(4)(A) . . . it preserved the established distinction between primary activities and secondary boycotts" (this page, emphasis supplied). And every description of a hot cargo agreement in the House and Senate confined its reach to the secondary boycott. Senator McClellan stated that (105

Cong. Rec. 3951-52, in 2 Leg. Hist. LMRDA 1007):

Closely related to the secondary boycott bill is one that would make unlawful a contract whereby an employer agrees in advance that he will not require his employees to handle goods or provide other services for the benefit of an employer who is involved in a labor dispute.

. . . [T]o insure that no hot-cargo clause shall be used as justification for, or in aid of, a secondary boycott, this bill outlaws hot-cargo clauses and provides a penalty against entering into them.

Senator (now President) Kennedy stated that (105 Cong. Rec. 6556, in 2 Leg. Hist. LMRDA 1162):

Under the amendment of the Senator from Tennessee, the Teamsters could not picket to enforce an agreement and entering into an agreement would be made an unfair labor practice, so that the Teamsters would not be able to persuade other employers, as a part of the general agreement with them, to refuse to handle goods from another employer who might be engaged in an economic dispute with a union.

Senator Curtis stated that (105 Cong. Rec. 6670, in 2 Leg. Hist. LMRDA 1197):

What it [a hot cargo clause] does is require an employer to agree that his employees do not have to handle goods which the union labels as "hot." And the union will label as hot the goods of any other employer so long as he will not agree to do what the union wants.

Senator Goldwater wrote that (105 Cong. Rec. 17674, in 2 Leg. Hist. LMRDA 1386):

Hot cargo clause: This is a provision in a collective bargaining contract which seeks to permit employees to refuse to perform work on materials or equipment received from or being sent to another employer with whom the union has a primary dispute.

Congressman Rhodes stated that (105 Cong. Rec. 15195, in 2 Leg. Hist. LMRDA 1543):

In the hot cargo situation, . . . a classical case would be where a union signed a contract with an employer stating that if the union so advised the employer, that the employer would not make his employees work on material from a plant which, for some reason, the union has blacklisted.

Congressman Elliott wrote that (105 Cong. Rec. 15552, in 2 Leg. Hist. LMRDA 1588):

A hot-cargo clause in a collective-bargaining agreement normally provides that employees will not be required to handle material from, or designated to plants where a union is conducting a strike.

Congressman Kearns wrote that (105 Daily Cong. Rec. A4308 (May 21, 1959), in 2 Leg. Hist. 1750):

It is made an unfair labor practice for an employer to enter into any agreement, including a "hot cargo" contract, to engage in a secondary boycott.

Congressman Wolf introduced an analysis which stated that (105 Daily Cong. Rec. A6654 (August 3, 1959), in 2 Leg. Hist. LMRDA 1777):

A hot-cargo clause in a collective bargaining agreement normally provides that employees will not be required to handle material from or destined for plants where a union is conducting a strike.

Congressman Hagen wrote that (105 Daily Cong. Rec. A8248 (September 15, 1959), in 2 Leg. Hist. LMRDA 1818):

A union cannot . . . Force the second company, by strike or otherwise, to sign an agreement that it will not deal with the target company. Such a hot cargo agreement is illegal, and existing contracts of this type are declared unenforceable and void.

The upshot of the history and purpose behind the enactment of section 8(e) was succinctly expressed by Senator Goldwater in a question-and-answer analysis (105 Daily Cong. Rec. A8358 (Sep. 24, 1961), in 2 Leg. Hist. LMRDA 1829):

They've plugged one more [loophole] which is the secondary boycott in futuro, or to put it more plainly, it's the agreement by an employer to permit a secondary boycott to be carried on against him. That's the hot cargo.

Now, the term "cargo" is misleading, because it gives the impression that this only involves transportation activities. But, actually, the term should really be "hot goods." "Hot goods" are goods which come from any enterprise or business or plant or establishment or factory which has a dispute with the union. Those are hot goods.

Question. Does it also apply if there is no union?

Answer. It doesn't make any difference. A union can have a dispute with an employer even if there's no union, and the dispute can be precisely that. What a hot cargo agreement is, is this: The union goes to Employer A and says, "We want you to sign a contract with us which will contain a provision that you will not require your employees to handle any goods or perform

any services that come from another employer with whom we have a dispute." In other words, it's an agreement to enter into a secondary boycott.

Thus, text, history, and purpose combine to show that section 8(e) is aimed at the hot cargo agreement sanctioning a secondary boycott. Nothing in the prohibited hot cargo agreement resembles a work preemption agreement. They differ in terms. They differ in purpose. They differ in origin and evolution. Illegalization of the hot cargo agreement leaves the work preemption agreement wholly untouched.

3. Two Minority Statements Suggesting that Section 8(e) Prohibits a Work Preemption Agreement Are Without Significance.

Against this massive showing it is necessary now to consider two minority statements which strike a discordant note. The first is a joint statement of Senator (now President) Kennedy and Congressman Thompson. The second is a statement of Senator Morse.

Senator Kennedy had favored invalidation of hot cargo agreements with motor carriers (105 Cong. Rec. 6556-58, in 2 Leg. Hist. LMRDA 1161-62), but he opposed extending the invalidation to all industry (105 Cong. Rec. 6667-69, in 2 Leg. Hist. LMRDA 1194-96). The Senate passed section 8(e) limited to motor carriers but the House later passed section 8(e) without limitation (supra, pp. 34-36). This was one of the disagreements which the conference was to attempt to reconcile. On August 20, 1959, subsequent to the House enactment of an unlimited section 8(e) but prior to conference, the Kennedy-Thompson statement was inserted into the Congressional Record as an analysis of the House "bill's secondary boycott and hot cargo provisions" and of "the differences between the bills passed by the House and Senate." 105 Cong. Rec. 16588, in 2 Leg. Hist. LMRDA 1706. It stated in part that (105 Cong. Rec. 16590, in 2 Leg. Hist. LMRDA 1708):

Subcontracting clauses: Companies and unions in manufacturing industries often agree upon restrictions upon subcontracting in order to protect the employees against the loss of jobs. For example, a textile concern might agree not to contract out the mending of cloth while any of its own members were unemployed. It would not be unusual for a power company to agree not to contract out any of its line construction while its own regular employees worked less than 40 hours a week. These clauses are frequently negotiated in all kinds of industries. They have nothing to do with hot cargo agreements or secondary boycotts. Yet they appear to be outlawed by the House bill.

The language of the House bill should be revised to avoid this interference with normal collective bargaining.

Senator Morse made his statement in a speech on the floor of the Senate just before the Senate was to vote on the conference agreement. In that speech he set forth his "reasons for not signing the conference report on the labor bill"; he was aware that "the conference report will be approved today by an overwhelming vote in the Senate"; but he stated that "I shall vote against it because I am convinced that it is not in the public interest." 105 Cong. Rec. 17856-57, in 2 Leg. Hist. LMRDA 1400-01. In opposition to section 8(e), he stated in the course of his speech that (105 Cong. Rec. 17884, in 2 Leg. Hist. LMRDA 1428):

First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.

* * *

Fourth. A manufacturing plant which agrees not to subcontract alteration or repair work would be illegal.

The Kennedy-Thompson and Morse statements are minority views. The Morse statement is avowedly so. The Kennedy-Thompson statement is clearly so. It favored limiting section 8(e) to motor carriers and, made in advance of the conference, it hoped to induce the House conferees to yield their views by exaggerating the consequences of an unlimited invalidation. But no proponent of an unlimited section 8(e) subscribed to the fears expressed in either statement. And nothing supports such fears except an isolated and simplistic reading of the language of section 8(e). Proponents could easily discount and reject any need to disclaim a charge that section 8(e) outlawed subcontracting clauses when these were clearly not the target of the section and could not be candidly confused with the hot cargo agreement at which the section was aimed. Proponents could take the Kennedy-Thompson statement at its word that subcontracting clauses "have nothing to do with hot cargo agreements or secondary boycotts." Since one has nothing to do with the other, outlawry of the former cannot be ascribed to prohibition of the latter.

In this context the Kennedy-Thompson and Morse statements have no significance. The "views of opponents to the enactment of legislation may not 'be relied upon as indicative of legislative intent. . . .'" S. H. Camp v. N.L.R.B., 160 F.2d 519, 521 (C.A. 6), and cases cited. The meaning of legislation that is voted up cannot be reliably drawn from the alarmist expressions of those who would exaggerate its effect in order to have it voted down. "The fears and

doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394. "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill." Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 288.

In sum, section 8(e) prohibits only an agreement sanctioning a secondary boycott. It does not reach an agreement confining the performance of defined work to the employees covered by it.

**E. Section 8(e) Does not Prohibit a Requirement
That, when Work Is to Be Contracted Out, It
Shall Be Let only to Persons under Contract
With the Union or Approved by It.**

**1. The Validity of an Absolute Prohibition
Against Contracting Out Establishes the
Validity of an Agreement which Conditions
But Does not Prohibit Contracting Out.**

In the light of the validity of an agreement confining the performance of defined work exclusively to the employees covered by the agreement, we are now in a position to consider the validity of the agreement in this case conditioning but not prohibiting the contracting out of work. The agreement provides that:

Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists.

The operative reach of this agreement is confined to "work . . . that comes under the jurisdiction of the Union and this contract . . ." The jurisdictional provision of the agreement enumerates the jobs within the contract unit and inferentially defines the work as that falling within the content of these jobs (J.A. 23, supra, p. 3). It is therefore work within the coverage of the contract to which the agreement relates. The agreement authorizes the employer to "send . . . out" this work whenever he "finds it feasible . . ." It thus commits to the employer's discretion the determination whether to retain the work within the unit or contract it out and thereby serves the employer's interest in flexibility. The agreement cabins the exercise of this discretion by confining the letting of work "to such shop or subcontractors approved or having contracts

with" the Union. It thus serves the Union's interest in being assured that the employer will contract out work only for reasons of efficiency and not because it is cheaper to do the work through another whose costs are lower because his employment standards are lower. For approval by the Union or a contract with it guarantees that the subcontractor to whom the work is let operates under labor standards commensurate with those which prevail with the employer who is contracting out the work. Since the labor standards are commensurate at both establishments, the employer has no incentive to contract out work to profit from cheaper labor standards prevailing elsewhere, with the result that contracting out will take place only when it genuinely contributes to greater efficiency. Thus the agreement meshes the employer's interest in flexibility with the Union's interest in maximizing the work and safeguarding the standards for which the Union has contracted.

By such an agreement a union and an employer each settle for half a loaf. The Union gives up insistence upon retention of all the work; the employer guarantees that work will not be sent out to profit from inferior labor standards prevailing elsewhere. The union is freed from the fear of losing the work to others operating under substandard conditions, and the employer obtains flexibility consistent with protecting the work and standards he has promised to abide. And the compromise unquestionably results in a legal covenant. The validity of an agreement confining the performance of defined work exclusively to the employees covered by it establishes the validity of a requirement that, if work is to be let, it shall be subcontracted only to an employer who operates under labor standards commensurate with the contractor's. The conditional leave is a lesser included part of the absolute prohibition and consistent in purpose with it. The condition is essential to preserve the work and standards of the agreement, to prevent contracting out from being perverted into an undercutting device.²¹ To say that the condition is illegal means that a union must bargain for maximum employment security or none at all. It would put management into a strait jacket by disabling a union from accommodating an employer's interest in flexibility without jeopardizing the union's interest in maintaining the integrity of the agreement. An interpretation of law so manifestly stultifying requires rejection.

²¹ See Subcontracting Clauses In Major Collective Bargaining Agreements, Bull. No. 1304, Bur. Lab. Stat., U.S. Dept. Lab. (1961).

The objective served by limiting the persons to whom work may be contracted to those maintaining commensurate labor standards has long been recognized as a valid goal of collective bargaining. Federal legislation aims at "eliminating the competition of employers and employees based on labor conditions regarded as substandard . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 504, n. 24; and see id. at 503-504, 507, n. 25. The policy of the National Labor Relations Act explicitly avows that an evil against which the statute is directed is "preventing the stabilization of competitive wage rates and working conditions within and between industries" (sec. 1, para. 2). Collective bargaining under the Act contemplates that a legitimate objective for both employers and unions alike is "avoiding the competitive disadvantages resulting from nonuniform contractual terms." N.L.R.B. v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96. The Board recently observed that "A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards." Local No. 41, International Hod Carriers Union (Calumet Contractors Assn.), 133 NLRB No. 57, 48 LRRM 1667; see also, Radio Broadcast Technicians, Local Union No. 1264, 123 NLRB 507, 527-529; Houston Building & Const. Trades Council (Claude Everett Const. Co.), 136 NLRB No. 28, 49 LRRM 1757.

Giving concrete effect to this general idea, the Supreme Court has upheld the validity of an agreement indistinguishable in principle from the subcontracting control embraced by the agreement in this case. Local 24, Teamsters Union v. Oliver, 358 U.S. 283. In Oliver, as a result of multi-employer and multistate collective bargaining, an agreement was reached between a Drivers Council and motor carriers. Article XXXII of the agreement prescribed terms and conditions which regulated the minimum rental and other terms of lease when a motor vehicle is leased to a carrier by an owner who drives a vehicle in the carrier's service. The Union defended the Article "as necessary to prevent undermining the negotiated drivers' wage scale said to result from a practice of carriers of leasing a vehicle from an owner-driver at a rental less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received." Id. at 289. The Supreme Court sustained the validity of the agreement, observing that the Article was the product and within the scope of mandatory collective bargaining under the National Labor Relations Act because its objective was (1) to maintain the "basic wage structure established by the

collective bargaining agreement" from undermining by owner-operators who would drive for less than what it cost the carrier to pay its own employees, and (2) to prevent "progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." *Id.* at 293-294. The principle validating protection of the work and standards of the employees covered by the agreement is the same whether the undercutting against which safeguards are erected comes from self-employed owner-operators or from employers of others. See also, *United States v. Drum*, 368 U.S. 370, 382, n. 26; *cf.*, *United States Pipe and Foundry Co. v. N.L.R.B.*, 298 F.2d 873 (C.A. 5).

In limiting the class of persons to whom the work may be subcontracted to those who maintain commensurate employment standards, it is necessary carefully to observe a sharp and basic distinction. Exclusion of others is grounded on the direct detriment to the employees covered by the agreement flowing from having their work done under substandard conditions. It is the adverse affect on them which is at the root of their concern. It is a direct benefit to their employment situation which they seek. Their purpose is not to limit their employer in the persons with whom he does business in order to further a dispute at another employer's establishment, or to protest objectionable conditions at another employer's establishment, or to improve the lot of the employees of another employer. They are activated by a primary concern with their own working welfare, not by a secondary concern with the unrelated working welfare of others. Their employer is not in the position of a neutral employer; their employer is the primary disputant from whom they seek an agreement safeguarding their own work and standards by removing an economic incentive in conflict with maintenance of both.

To be sure, the consequence of an agreement limiting the persons to whom work may be subcontracted to those who maintain commensurate standards may be to require the employer to refrain from or cease doing business with others. But the same consequence inheres in an agreement confiding the performance of defined work exclusively to the employees covered by the agreement. The two agreements are adjuncts of each other; the consequence is the same in both; and the same consequence cannot be fatal to the former agreement when it is not to the latter agreement. "As long as the union can show that the subcontracting provision will directly benefit employees covered thereby, its other motives, as well as the incidental effects of such an arrangement on outsiders, should not be made the basis for declaring the agreement illegal." Aaron, *The Labor-Management Reporting and Disclosure Act*

of 1959, 73 Harv. L. Rev. 1086, 1119 (1960).

The nub of the problem was laid bare by this Court in Retail Clerks Union Local 770 v. N.L.R.B., 296 F.2d 368, 373-374. The Court first held that an agreement may validly preserve to bargaining unit employees the work of the unit and prohibit the subcontracting of it. Id. at 373. It then remanded to the Board consideration of an exception by which work could be subcontracted to another employer who has an agreement with the union. Id. at 374. The Court cautioned the Board that in explicating its conclusions and reasons (id. at 373-374):

It cannot do so by blanket pronouncements in respect to subcontracting clauses. These clauses take many forms. Some prohibit subcontracting under any circumstances; some prohibit it unless there is sufficient work in the shop to keep shop employees busy; some prohibit it except where the subcontractor maintains a wage scale and working conditions commensurate with those of the employer who is party to the collective agreement. On the face of it, these provisions would seem to be legitimate attempts by the union to protect and preserve the work and standards it has bargained for. In the latter supposition, for example, the union may be attempting to remove the economic incentive for contracting out, and thus to preserve the work for the contracting employees. [Emphasis supplied.]

The Board in this case commits the error against which this Court cautioned. It makes a blanket pronouncement invalidating any limitation upon the class of persons to whom work may be subcontracted. In reaching this conclusion, it not only does not take into account but deliberately refuses to consider the validity of an absolute prohibition against contracting out of work. It thus incapacitates itself from weighing the validity of conditional leave to subcontract in relationship to the validity of the absolute prohibition. It fails to realize that both the absolute prohibition and the conditional leave "would seem to be," as this Court has stated, "legitimate attempts by the union to protect and preserve the work and standards it has bargained for." For in limiting the class of persons to whom work may be subcontracted to those who maintain commensurate labor standards -- which is the end achieved by confining the class to persons operating under a contract with the Union or approved by it -- the Union in this Court's words "may be attempting to remove the economic incentive for contracting out, and thus to preserve the work for the contracting employees." The Board thus reaches its decision in disregard of the element crucial to a sound determination. For it does

not understand that limitation of the persons to whom work may be subcontracted to those maintaining commensurate standards serves to protect the work and standards established by the agreement.

The Board's error is revealed by the single cryptic sentence which is its sole explanation for its conclusion: "We see no meaningful distinction between a contract which prohibits an employer from handling products produced by a nonunion firm and a contract which causes an employer to cease subcontracting to a nonunion firm" (J.A. 9). We deduce from this sentence that the Board assimilates the agreement in this case to a refusal of employees to handle or work on behalf of their employer on a product which is in the union's disfavor because of objectionable conditions deemed to prevail at the original place of the product's manufacture: the refusal of union carpenters to hang doors manufactured by a nonunion firm (Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 94-96); the refusal of union carpenters to install a precut staircase made by a nonunion concern (N.L.R.B. v. Local 1016, United Brotherhood of Carpenters, 273 F.2d 686 (C.A. 2)); the refusal of sheet metal workers represented by one union to install ventilators because manufactured by employees represented by a different union (Sheet Metal Workers' International Association v. N.L.R.B., 293 F.2d 141 (C.A.D.C.)).

The distinction between the product boycott upon which the Board relies and the agreement in this case is obvious and decisive. It is not the job of the installing carpenters to manufacture doors or staircases; nor is it the job of the installing metal workers to fabricate ventilators. Their refusal to install the disfavored products is not related to preservation of their own work. The making of the door, the precutting of the staircase, the fabrication of the ventilator is not work they would have done. The quantum of work available to them and the labor standards for doing it are undiminished because of the conditions prevailing at the place of manufacture. Their refusal to install the disfavored product is therefore the traditional secondary boycott designed to protest objectionable standards existing elsewhere unrelated to preservation of the protesting employees' immediate welfare at their own place of employment.

Not so with the agreement in this case. The agreement relates entirely to the work that the employees covered by it have been hired to do. It is work which, were it not contracted out by the employer, would be performed by his own employees. It is the employees' own work upon which a subcontracting

limitation is placed. The agreement authorizes that work to be subcontracted, but harnessed by the requirement that the person to whom it is let maintain commensurate labor standards so as to prevent contracting out from being perverted into a means of undercutting the work and standards for which the Union has bargained. The agreement thus accommodates the employer's interest in flexibility with the Union's interest in preventing abuse of that flexibility as an undercutting device. To assimilate this agreement with a product boycott is a telling measure of the untenability of the Board's position. Subsequent to its decision in this case, the Board has recognized the lack of merit in its analogy to the product boycott. As it has explained, "The product boycott cases . . . [are] inapposite, for they involved the refusal of employees to work on the nonunion products of other than their own employers, products which they would not themselves manufacture in the course of their employment. The threat of displacement in the normal course of their employment was remote and posed no violation of their contractual rights." International Longshoremen's Local Union No. 19, 137 NLRB No. 13, sl. op. 11-12, n. 4, 50 LRRM 1090.

2. The Provisos to Section 8(e) Pertaining to the Construction and Clothing Industries Do Not Imply That a Limitation upon the Class of Persons to Whom Work may be Subcontracted Is Prohibited in Any Other Industries.

It has been argued to the Board in other cases that in the provisos to section 8(e) dealing with the construction and clothing industries Congress has described the only situations in which it means to allow a limitation to be placed upon the class of persons to whom work may be subcontracted. The argument is that, as express leave to condition subcontracting has been granted in the construction and clothing industries, by negative implication in all other situations and industries, if subcontracting is to be permitted at all, it must be permitted without limitation. We proceed to show the invalidity of the argument, since its disposition appears essential to an interpretation of section 8(e). However, the Board has not addressed itself to this argument, either to approve or reject it, so that the case again is in the unfortunate posture of requiring treatment of an issue without a previous expression by the Board of its view of it.

(a) The construction industry: The first proviso states that nothing in section 8(e) "shall apply to an agreement between a labor organization and an

employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ." This proviso maintains the status quo as it existed prior to the enactment of section 8(e) with respect to agreements pertaining to the subcontracting of work at the construction site. H. Rep. No. 1147, 86th Cong., 1st Sess., 39-40, in 1 Leg. Hist. LMRDA 943-944; 105 Cong. Rec. 17900, in 2 Leg. Hist. LMRDA 1433. This means that agreements otherwise prohibited by section 8(e) may in this situation and industry be validly entered into and voluntarily observed but not coercively enforced. *Ibid.* In short, the law as enunciated by the Supreme Court in Local 1796, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, continues to apply.

Obviously nothing in the preservation of the status quo in this situation and industry can reveal the extent to which the status quo was changed in other situations and industries. We know that a true hot cargo agreement may be validly entered into and voluntarily observed in this situation and industry. We know too that this is not true in other situations and industries except as the second proviso preserves the status quo in the clothing industry. But nothing in either of these propositions establishes that subcontracting provisions which are not in the hot cargo class have also been invalidated. In short, all that the proviso shows is that it saves whatever is barred by section 8(e). But it does not tell us what section 8(e) bars.

(b) The apparel and clothing industry: The second proviso states that "for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

This proviso too in large part maintains the status quo as it existed in

the apparel and clothing industry prior to the 1959 amendments.²² The story begins in 1949. The method of manufacture in the apparel industry is a highly integrated process in which the garment is designed and cut by the manufacturer or jobber, then sent to a contractor or subcontractor for sewing and finishing, and finally returned to the manufacturer or jobber for sale and distribution. In 1949, in considering then pending amendments to the Taft-Hartly Act, a colloquy took place on the Senate floor between Senators Ives and Taft. Senator Ives described the method of manufacture in the garment industry, stated that in the union's dispute with either the manufacturer or contractor economic pressure might be applied to the other, and asked whether this would constitute a secondary boycott, expressing his firm belief that it would not. Senator Ives' comment and question reads in part as follows (95 Cong. Rec. 8709):

It has been suggested that this might fall within the ban of the literal language of section 8(b)(4) and section 303 of the Taft-Hartley Act or of section 8(b)(4) and sections 16 and 17 of the Taft substitute. I am sure this was never the intention of the sponsors of the act or of the Congress. The jobber and his contractors are obviously engaged in a unified and integrated production effort, and they do not stand as neutrals with respect to one another in any labor dispute against the other. Rather, they are allies because they are engaged in a common enterprise. It seems plain to me that they are not to be deemed separate employers, but, rather, a single unified employer of all workers engaged in every phase of the manufacture of the garments, no matter on whose premises the workers are located. Economic pressure exerted against either jobber or contractor cannot be construed as secondary action against either, but must be deemed primary against both. The secondary boycott provisions of the act and of the Taft substitute therefore have not the slightest application.

Does the Senator from Ohio agree that it was never the intention of Congress to have the secondary boycott provisions of the act apply to this situation?

In reply, Senator Taft assured Senator Ives that there was no secondary boycott in the situation described, explaining that (*ibid.*):

Mr. President, the secondary boycott ban is merely intended to prevent a union from injuring a third person who is [not]

²² For a full statement of the origin, evolution, and present status of subcontracting control in the garment industry, see the decision of the Federal Trade Commission in California Sportswear & Dress Assn., Inc., 54 FTC 835.

involved in any way in the dispute or strike, and therefore should not suffer economic damage simply because of the action of a labor union. It is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer.

On the basis of the facts stated by the Senator from New York, I do not believe the law was intended to apply to the case he cites, where the secondary employer is so closely allied to the primary employer as to amount to an alter ego situation or an employer relationship. It should not apply, and I think Judge Rifkind practically decided that in the so-called Project Engineering Co. case. [Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S.D.N.Y.)].

I may say that one of the changes we are making in the law is to remove the ban of the secondary boycott in a case where there is a strike in one plant and then the work is transferred to another plant, because we feel that in that case the men who are striking should be able to picket the second plant in order that the men there may not work on the work on which the men in the first plant were refusing to work.

The spirit of the act is not intended to protect a man who in the last case I mentioned is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike.

So not only do I think the law of the case is as I have indicated, and does not prohibit the particular action referred to in the facts cited by the Senator in his question, which I have seen and have had the privilege of reading, but the spirit of the act is entirely contrary to applying it in that kind of a case.

On August 13, 1959, a colloquy took place on the House floor among Congressmen Teller, Landrum, and Griffin as to whether the pending House amendments changed the law in this situation. Congressman Teller repeated in full the 1949 colloquy between Senators Ives and Taft and then asked the following question (105 Cong. Rec. 15848-49, in 2 Leg. Hist. LMRDA 1680-81):

Does section 705(a) of H.R. 8400 dealing with section 8(b)(4) vary or modify in any way the interpretation of that section as stated in the colloquy between Senator Ives and Senator Taft, on the floor of the Senate on June 30, 1949, that the "ally" doctrine extends also to situations like the ladies' garment industry where, under its unique jobber-contractor system of production, it is recognized that the jobber and contractor are together engaged in a unified and integrated production effort?

Congressmen Landrum and Griffin emphatically assured Congressman Teller that no change was intended (105 Cong. Rec. 15849, in 2 Leg. Hist. LMRDA 1681):

Mr. LANDRUM. Mr. Chairman, I wish to thank the gentleman for propounding that inquiry. I think it is a matter which ought to be clarified. I believe the gentleman knows that I have a desire to be fair. I have no desire whatsoever to outlaw anything that is legal. My efforts in this matter are solely directed at trying to close loopholes against that which is illegal. And so I say, Mr. Chairman, in response to the inquiry propounded by the gentleman, that I subscribe in whole to Senator Taft's reply to Senator Ives, and state that it is not my intention nor do I believe it to be included in H.R. 8400 that this doctrine of law concerning the "ally" doctrine is altered in any way.

Mr. TELLER. And the gentleman does confirm the interpretation of Senator Taft?

Mr. LANDRUM. Yes.

Mr. TELLER. Mr. Chairman, I regard the gentleman from Georgia highly, as the gentleman knows. He has made valuable contributions to the deliberations of our committee and I respect him sincerely. I thank the gentleman.

May I propound the same question, Mr. Chairman, to my colleague, the gentleman from Michigan [Mr. Griffin].

Mr. GRIFFIN. Mr. Chairman, the gentleman from New York now in the well of the House is one of the country's most learned men in this field. He knows the answer to the question before he asks it. The amendments to Taft-Hartley Act proposed in our bill, H.R. 8400, would in no way affect the existing law concerning the allied employer doctrine, and there is no intent to do so.

Mr. TELLER. And the gentleman does accept the interpretation of Senator Taft?

Mr. GRIFFIN. That is right.

Thereafter, on August 31, 1959, on the Senate floor, while the conference to reconcile the divergent House and Senate bills was still in progress, Senator Javits expressed concern that an unintended departure from the understood meaning might nevertheless take place. 105 Cong. Rec. 17381, in 2 Leg. Hist. LMRDA 1384-85. His point was expressed in an editorial of the New York Times which he spread upon the record, and which in part states that (*ibid.*):

Of all the complicated controversial issues raised by the House and Senate labor bills, on which the conference committee has asked instructions from the Senate, one is really not controversial nor is it especially complex. It ought to be quickly settled. We refer to subdivision 8(a) of section 705(a) of the Landrum-Griffin bill which prohibits the making of any collective

agreement with an employer "whereby such employer * * * agrees to cease doing business with any other person."

A narrow court interpretation of this language might wreck the whole structure of labor-management relations in the garment and clothing industries built up over the years and now become traditional. * * *

So close have these two parts of the single production process become that jobbers and contractors have been considered as one in applying the provisions of the Taft-Hartley law which prohibit secondary boycotts. Senator Taft himself agreed to this in discussing the law's intent on the Senate floor and so have Representatives Landrum and Griffin as to their bill during the debate in the House and in the conference committee discussions.

But such assurances do not have the force of law. Whatever bill may emerge from the deliberations this week should clearly and explicitly exempt these traditional union-jobber agreements from secondary boycott prohibitions. This situation is a good illustration of the urgent need for care in drafting this legislation so as to avoid interference with already established and legitimate labor union practices in the effort to check corruption, dictatorship and the violation of the rights of innocent parties.

Senator Goldwater responded with assurance that "We conferees are in the very peculiar position of everyone of us agreeing that we do not intend to upset the status quo of the garment or apparel industries" (*ibid.*). Adoption by the conference and enactment by the Congress of the apparel and clothing proviso followed.

The apparel and clothing proviso is thus clearly the product of a superabundance of caution.²³ It specifically writes into the statute an accepted

²³ An additional reason for great caution, and accordingly for a specific proviso, is that subcontracting control in the apparel and clothing industry is so embracing and pervasive that it has virtually no counterpart in other industry. Thus, it may well have been thought that, while section 8(e) does not touch conventional subcontracting control in other industry, it would not be safe to assume that the same was necessarily true of the qualitatively different form of subcontracting control in the apparel and clothing industry. Hence the proviso to remove any possible doubt. The point is illustrated by the following summary of subcontracting control in the apparel and clothing industry which shows that it is without precedent in any other industry: jobbers and manufacturers may use only union contractors; they may use only such union contractors as they designate by submitting written notification of such designation to the union and receiving its approval; should they desire to cancel or modify the designation of any of their contractors, including adding or eliminating designated contractors, they must obtain approval from the union; manufacturers or jobbers must confine their production to their own shop and only to such contractors designated by them, and, in turn, contractors must confine their production to manufacturers or jobbers who have designated them; no contracting or subcontracting is

(continued on next page)

interpretation of the meaning of both the Taft-Hartley Act and the 1959 amendments which would exist even without the proviso. It forecloses in that industry any argument that the relationship to each other of manufacturer-jobber and contractor-subcontractor is that of neutral employers whose business relationship is safeguarded from interruption. It requires them to be treated as a single employer. But the proviso is but a specific manifestation of a general principle whose vitality remains undisturbed. The principle is that legally separate business entities, united by common ownership, control, cooperation, or integration, may not be entitled to the sheltered status of neutrals when economic pressure against one is exerted in aid of a dispute against the other. The pith of the idea was expressed and applied by this Court in an opinion which deserves quotation at length (Local No. 24, Teamsters Union v. N.L.R.B., 105 U.S. App. D.C. 271, 266 F.2d 675, 680):²⁴

The answer to the problem before us cannot be reached by the use of any legalistic word or phrase, such as "co-employer," or "independent contractor," or even "ally." It cannot be solved by the strict application of the technicalities which adhere to such legal terms. The problem is, as dissenting member Bean put it, whether the facts and circumstances are such that the strikers violated the secondary boycott provision of the statute when they picketed the terminals of ACE and induced the employees of ACE to honor their picket lines.

It is our view that the relationships of ACE, these drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the total fabric of mutual obligation.

²³ (continued from preceding page)

permitted within the shop of any individual employer; payment by the manufacturer and jobber to their contractors, for the latter's services in fabricating the garments, must be sufficient to pay the wages of the contractors' employees plus a reasonable amount for overhead; and numerous other particulars of the relationship are regulated in detail. California Sportswear & Dress Association, 54 FTC 835, 860-862; Subcontracting Clauses In Major Collective Bargaining Agreements, Bull. No. 1304, Bur. Lab. Stat., Dept. of Lab., 11-13, 26-30 (1961); Wolfson, The Role Of The ILGWU In Stabilizing The Women's Garment Industry, 4 Ind. and Lab. Rel. Rev. 33 (1950). A proviso directed to this highly unique method of subcontracting control in this specific industry is no safe basis from which to deduce that conventional subcontracting control in other industries has been totally invalidated.

²⁴ For expression and application of the same idea, see Truck Drivers and Helpers Local Union No. 728 v. Empire State Express, Inc., 293 F.2d 414 (C.A. 5), cert. denied, 368 U.S. 931.

Those strands are clearly part of the pattern of the employer-employee relationship.

As we pointed out in *Seafarers International Union, etc. v. N.L.R.B.*, [265 F.2d 585, 591], this section 8(b)(4)(A) and (B) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as "independent contractors," "co-employers," or "allies." But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts in the case. This is such a case. We need not devise a new word to describe the relationship here depicted. We think the Board erred in limiting itself to the meaning of the legal term "independent contractor."

To state the matter otherwise, we agree with the contentions of our petitioners as the trial examiner described them. He said:

"Rather, the Respondents [our petitioners] say, the businesses of the Lessors and ACE are so integrated operationally that for purposes of this proceeding they must be deemed either a single employer, a joint or common venture, a 'straight line' operation within the Board's understanding of that term, or an alliance of interest. The Respondents maintain that whichever term may best be used to describe the relationship among ACE and the Lessors, their business arrangements are such that in the Union's dispute with the Lessors or any one of them neither ACE nor any of the Lessors is so unconcerned therewith that it is statutorily shielded as a neutral from an extension of the dispute by the Union to its operations, and, therefore, the Union's picketing and inducement herein occurred at premises which in this proceeding should be regarded as primary and not secondary."

Nothing in the apparel and clothing proviso disturbs this vital principle. The proviso is but a specific application of it. It embodies a legislative determination that the requisite relationship exists among the associated employers in the apparel and clothing industry depriving them of neutral status vis-a-vis each other. It does not express a legislative determination that the requisite relationship does not exist in other industries and situations. Whether or not it does exist in other industries and situations requires, now as before, a particularized case by case consideration of the relationships and circumstances disclosed by each record.

There is thus nothing revolutionary in the apparel and clothing proviso

and therefore nothing in it to justify the conclusion that Congress has by legislative indirection disallowed subcontracting control in other industries and situations. The advance which this proviso does make, not applicable elsewhere, lies in a little noticed part of it. Application of subcontracting control may sometimes run afoul of other provisions of the Act. Operating Engineers Local Union No. 3 v. N.L.R.B., 105 U.S. App. D.C. 307, 266 F. 2d 905, cert. denied, 361 U.S. 834. The apparel and clothing proviso prevents that possibility in the industry to which it applies, for its concluding sentence states that "Nothing in this Act shall prohibit enforcement of any agreement which is within the foregoing exception" (emphasis supplied).

In sum, neither proviso permits the conclusion that in every industry and situation not excepted by the provisos there may be no limitation of any kind placed upon the class of persons to whom work may be subcontracted. Hence, as in this case, to assure that work will be subcontracted only to persons maintaining commensurate labor standards so that the integrity of the work and standards established by the agreement will be preserved, the agreement may validly require that the persons to whom work is subcontracted shall be approved by the union or operate under an agreement with it.

CONCLUSION

For the reasons stated, the order of the Board should be set aside.

Respectfully submitted,

PLATO E. PAPPS

LOUIS P. POULTON

1300 Connecticut Avenue, N. W.
Washington 6, D. C.

BERNARD DUNAU

912 Dupont Circle Building, N. W.
Washington 6, D. C.

Attorneys for Petitioner

June 1962

REPLY BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside and on
Request to Enforce an Order of
The National Labor Relations Board

PLATO E. PAPPS

LOUIS P. POULTON

1300 Connecticut Ave., N.W.
Washington 6, D. C.

BERNARD DUNAU

912 Dupont Circle Building
Washington 6, D. C.

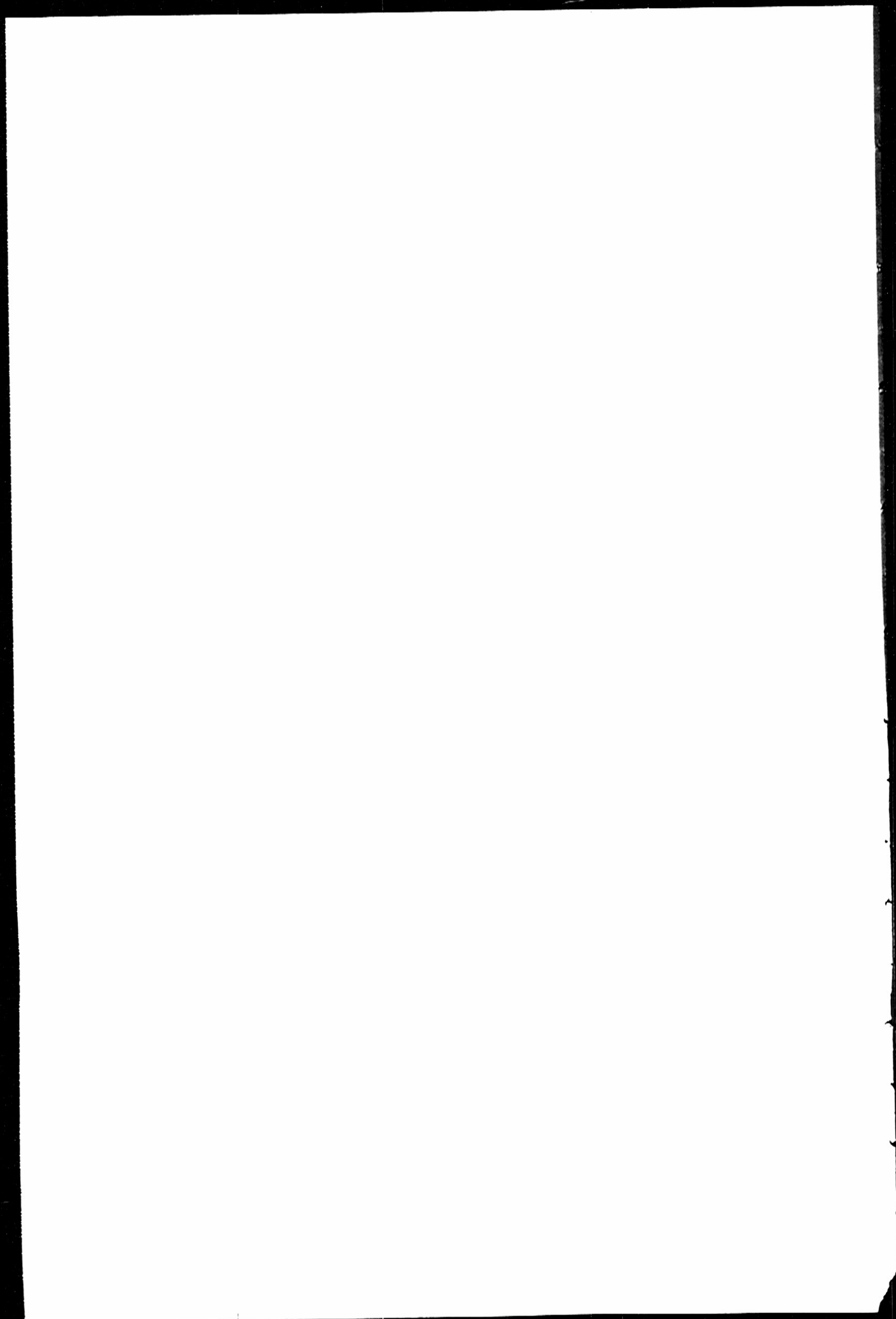
Attorneys for Petitioner

United States Court of Appeals
for the District of Columbia Circuit

SEP 12 1962

Joseph W. Stewart

CLERK



(i)

INDEX

	<u>Page</u>
I. THE WORDS "TO ENTER INTO" AN AGREEMENT CANNOT BE MUTATED INTO REAFFIRMATION, MAINTENANCE, PERFORMANCE OR ENFORCEMENT OF AN AGREEMENT	1
II. THE OBJECT OF REQUIRING THAT THE PERSONS TO WHOM WORK IS SUBCONTRACTED SHALL BE APPROVED BY THE UNION OR OPERATE UNDER A CONTRACT WITH IT IS TO ASSURE THAT THE WORK WILL BE PERFORMED UNDER COMMENSURATE LABOR STANDARDS	9

AUTHORITIES CITED

Cases:

Amalgamated Lithographers of America, 137 NLRB No. 179, sl. op. pp. 10-11, 50 LRRM 1448, 1450-51	2
Apex Hosiery Co. v. Leader, 310 U.S. 469	12
Coulon v. Carey Cadillac Renting Co., 50 LRRM 2888 (S.D. N.Y., Aug. 2, 1962)	9
Cuneo v. Essex County District Council, 50 LRRM 2979 (D. N.J., August 16, 1962)	13
Dan McKinney Co., 137 NLRB No. 74, sl. op. o. 10 and n. 22, 50 LRRM 1225, 1229	2
General Drivers, Local 886 v. National Labor Relations Board, 101 App. D.C. 80, 247 F. 2d 71, 74	3
Local 357, Teamsters Union v. National Labor Relations Board, 365 U.S. 667, 676	12
Local 636, United Association v. National Labor Relations Board, 108 App. D.C. 24, 278 F. 2d 858	11
Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board, 357 U.S. 93, 107	3, 4, 7
Local Lodge 1424 v. National Labor Relations Board, 362 U.S. 411, 428-429	8
Los Angeles Mailers Union No. 9 v. National Labor Relations Board, C.A.D.C. No. 16,887	7
McComb v. Scerbo, 177 F. 2d 137, 141 (C.A. 2)	8

	<u>Page</u>
National Labor Relations Board v. Local 294, Teamsters Union, 298 F. 2d 105, 108 (C.A. 2)	8, 12
National Labor Relations Board v. News Syndicate Co., Inc., 365 U.S. 695, 699-700	12
Retail Clerks Union Local 770 v. National Labor Relations Board, 111 App. D.C. 246, 296 F. 2d 368	10, 11

Statutes:

National Labor Relations Act:

Sec. 8 (a)(3)	8
Sec. 8 (b)(3)	5
Sec. 8 (b)(4)	4, 5
Sec. 8 (b)(4)(A)	5, 7
Sec. 8 (b)(4)(B)	7
Sec. 8 (e)	2, 3, 4, 5, 7, 8, 9, 13

Miscellaneous:

Frankfurter, <u>Some Reflections on the Reading of Statutes</u> , 47 Col. L. Rev. 527	7
Friendly, <u>The Federal Administrative Agencies: The Need for Better Definition of Standards</u> , 75 Harv. L. Rev. 863 (1962)	13
<u>Subcontracting Clauses in Major Collective Bargaining Agreements</u> , Bull No. 1304, Bur. Lab. Stat., Dept. of Lab. (1961)	11
105 Cong. Rec. 3952	7
105 Cong. Rec. 16590	5, 6
S. Min. Rep. No. 187, 86th Cong., 1st Sess.. 80	6

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,901

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside and on
Request to Enforce an Order of
The National Labor Relations Board

REPLY BRIEF FOR PETITIONER

I. THE WORDS "TO ENTER INTO" AN AGREEMENT CANNOT BE MUTATED INTO REAFFIRMATION, MAINTENANCE, PERFORMANCE OR ENFORCEMENT OF AN AGREEMENT

In fifteen pages of argument (pp. 8-23) the Board does not once address itself to the question of how as a matter of reading English the words

"to enter into" an agreement can be made to mean reaffirm, maintain, perform, or enforce an agreement. There is no suggestion that the words as words are ambiguous, subject to disparate interpretation, capable of bearing different meaning based on factors external to the text. There is simply a blithe disregard of any obligation of fidelity to language. Loosed of the discipline of adherence to the meaning of words the Board has reached wondrous conclusions. It holds that an exchange of letters between employers and a union in which the employers disclaim an intention to question the legality of an existing agreement constitutes entry into it. Amalgamated Lithographers of America, 137 NLRB No. 179, sl. op. pp. 10-11, 50 LRRM 1448, 1450-51. Better than that. It holds that an employer's unilateral and voluntary act of adherence to an existing agreement, an adherence which the Board assumes was not "sought, assented to, or acquiesced in by the Union," is nevertheless "within the scope of the prohibition of Section 8(e) against entering into such contracts. . . ." Dan McKinney Co., 137 NLRB No. 74, sl. op. p. 10, and n. 22, 50 LRRM 1225, 1229. Apparently then an act to which only one person is a party can constitute entry into an agreement contrary to the universal belief that "There must be at least two parties in a contract. . . ." Restatement, Contracts, § 15 (1932). If words are to have any integrity as the expression of meaning there is no way of reading "to enter into" an agreement as the Board does.¹

The heart of the Board's justification for its utter disregard of the statutory words is its belief that Section 8(e) must "make the mere existence of the unlawful contract an unfair labor practice" in order to eliminate the moral suasion to live up to its terms said to flow from its bare being (Br. pp. 2, 3, 4, 11, 14-15, 20, 21, 22). This contention is derived

¹ The indulgence of so private a vocabulary troubled even Alice. "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean - neither more nor less.' 'The question is,' replied Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master - that's all.'"

from a distortion of the thought expressed in the Supreme Court's decision in Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93.² In holding that a hot cargo agreement does not privilege a strike or its inducement directed at a neutral employer to cause him to boycott another, the Supreme Court stated that, while the statute contemplated that a neutral employer was free to boycott another, it also contemplated that his choice whether or not to boycott should not be foreclosed by his previous agreement but should be made without the coercion of a strike or its inducement at the time when he is actually confronted with the specific situation calling for choice (id. at 105-106):

Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott another arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures - whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his - must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. . . . This is so because by the employer's intelligent exercise of such a choice under the impact of a concrete situation when judgment is most responsible, and not merely at the time a collective bargaining agreement is drawn up covering a multitude of subjects, often in a general and abstract manner, Congress may rightfully be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited.

Thus, even before the 1959 amendments, Congress had effectively safeguarded the neutral employer's freedom to decide at the time of the event whether or not to boycott another, for his insulation from a strike or its inducement to enforce a hot cargo agreement did "in practical effect render nugatory" the agreement itself. General Drivers, Local 886

² Incidentally, the Board is quite inaccurate in attributing to that decision the holding that hot cargo "agreements were not illegal. . ." (Br. p. 10). The Supreme Court distinctly reserved that question (357 U.S. at 107-108). Section 8(e) put the question to rest.

v. N.L.R.B., 101 App. D.C. 80, 247 F. 2d 71, 74, reversed on other grounds, 357 U.S. 93. The little that was left that might possibly impair freedom of choice at the time of the event was sealed off by the 1959 amendments without any need to mutate the statutory text. Section 8(e) renders the prohibited agreement "unenforcible and void," so that the neutral employer is freed of any concern that he will be answerable for violation of the agreement in an action for damages or specific performance. Furthermore, the amendment of Section 8(b)(4) adds to the then existing prohibition of the strike or its inducement a ban against threats, restraint, or coercion. Freedom of choice is therefore as perfectly guaranteed as the capacity of law permits.

And so the Board is reduced to invoking the specter of moral suasion said to flow from the mere existence of the agreement to show impairment of freedom of choice by which it would justify its distortion of the statutory text. It is hard to imagine what meaningful suasion flows from an "unenforcible and void" agreement incapable of effectuation by a strike, the inducement of a strike, threats, coercion, restraint, or legal action. Freedom of choice is not impaired by a devitalized and impotent instrument. The 1959 amendments enhance and solidify, without any need to stretch their import, the truth of the observation that "A voluntary employer boycott does not become prohibited activity simply because a hot cargo clause exists." Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 107.

But if it can be said that a sterile instrument nevertheless exerts moral suasion, it is still far from evident that Congress intended to train legal guns on the influence of conscience. It is far more likely that, having extinguished the agreement as a viable basis of legal compulsion, it was indifferent to the amorphous manifestations of moral suasion. At the least we should expect very clear words before ascribing to Congress an intention to legislate against moral scruples; certain it is that so doubtful an intention cannot justify distortion of words to make them bear an altogether alien meaning.

Nothing in the Kennedy-Thompson statement, upon which the Board places primary reliance (Br. pp. 11-12), supports its position. The statement identifies two areas of concern: (1) "It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages, or [2] to refuse to live up to the contract once it has signed it, when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, thus freeing the union to present new demands in collective bargaining." 105 Cong. Rec. 16590, in 2 Leg. Hist. LMRDA 1708. Section 8(e) in terms meets each concern. First, by prohibiting entry into a hot cargo agreement, Section 8(e) removes the subject from the trading area of the bargaining table. Since it is unlawful to demand a hot cargo clause in negotiations, it is unlawful to exact a concession on another subject as the condition of relinquishing the demand. The conduct would constitute a refusal by the union to bargain in good faith in violation of section 8(b)(3) of the Act. And any strike or cognate pressure to secure a hot cargo agreement is of course in terms forbidden by section 8(b)(4)(A) of the Act. Second, Section 8(e) of the Act prohibits treating noncompliance with a hot cargo clause as a material breach of the agreement justifying its termination with the consequent need of negotiating a new agreement. It states that "any contract or agreement entered heretofore or hereafter containing such an agreement [*i.e.*, a hot cargo provision] shall be to such extent unenforcible and void" (emphasis supplied). Only the offensive provision is nullified, the rest of the agreement remaining intact. Section 8(e) therefore precludes a claim that an employer's failure to comply with a hot cargo provision is a material breach of the agreement discharging the union's obligation to perform its other terms.

Section 8(e) thus closes the two specific means of exploiting a hot cargo agreement identified in the Kennedy-Thompson statement. Nothing in that statement suggests that an abuse additionally to be feared is the moral suasion said to flow from the agreement, or that section 8(e) was

or should be directed at that. Indeed, the statement is alert to the legitimacy of persuading an employer and cautions against closing that route. "It would seem that a union ought to be able to ask a friendly concern to stop dealing with a company which will not observe fair labor standards." 105 Cong. Rec. 16590, in 2 Leg. Hist. LMRDA 1708. "It is certainly proper to protect the [neutral] department store owner against a strike if he refuses the union's request - protection which is available under present law - but if the store owner is willing or even anxious to help maintain decent standards of living, it would be a denial of freedom of expression to say that the union may not even make the request." *Ibid.* Obviously the concern expressed in the statement as to moral suasion was not to legislate against it but to preserve its influence. The minority members of the Senate Labor Committee (who criticized the Committee for reporting a bill which did not invalidate the hot cargo agreement, who proposed to offer amendments on the subject on the Senate floor, and whose views ultimately prevailed, Pet. br. p. 33) put the matter accurately (S. Min. Rep. No. 187, 86th Cong., 1st Sess., 80, in 1 Leg. Hist. LMRDA 476):

S. 748 [which the Committee had not reported] makes it an unfair labor practice for a union to coerce an employer to enter into such an agreement, or having entered into it, for a union to coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it. Only the latter is now unlawful under the Taft-Hartley Act. [Emphasis supplied.]

The statute as finally enacted fulfilled the scope thus envisaged by the proponents of regulation of the hot cargo agreement, namely, an employer "having entered into" a hot cargo agreement, it was made an unfair labor practice "for a union to coerce the employer to live up to it. . . ." Coercion is the target of the unfair labor practice proceeding. Moral suasion to live up to a hot cargo agreement said to flow from its mere existence was no part of the evil apprehended or legislated against as

an unfair labor practice.³

The Board in its brief (pp. 12-14) devotes three pages to quotations from the legislative history to show "the plainly expressed purpose of the legislators to 'outlaw' hot cargo clauses" (p. 12). The Board thus gives "point to the quip that only when legislative history is doubtful do you go to the statute."⁴ Multiplication of quotations is unnecessary to demonstrate that Congress invalidated the hot cargo agreement. It is necessary only to read the plain statement in section 8(e) that such an agreement shall be "unenforcible and void." The point at issue is not whether Congress has invalidated the hot cargo agreement. The point at issue is the means adopted by Congress to effectuate that invalidation. As before the 1959 amendments, so still, the statute "describes and condemns specific union conduct directed to specific objectives." Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93, 98. And the means of condemnation chosen by Congress are clear. Entry into the proscribed agreement is forbidden as an unfair labor practice by section 8(e); coercion by a strike and cognate pressure to compel entry into the proscribed agreement is forbidden as an unfair labor practice by section 8(b)(4)(A); coercion by a strike and cognate pressure to enforce the proscribed agreement is forbidden as an unfair labor practice by section 8(b)(4)(B); and for other purposes outside the context of an unfair labor practice proceeding the proscribed agreement is rendered "unenforcible and void" by section 8(e). This arsenal is fully equal to effectuation of Congress' purpose to

³ At page 21 of the Board's brief in No. 16,887, Los Angeles Mailers Union No. 9 v. N.L.R.B., but not at the corresponding page of its brief in this case (p. 13), the Board quotes Senator McClellan's statement that "Also to be considered is the possible nonlegal effect of such a clause as a gentlemen's agreement providing moral suasion against an employer." 105 Cong. Rec. 3952, in 2 Leg. Hist. LMRDA 1007. It is first to be noted that this effect was described as merely "possible." And there is no suggestion that this "possible" effect was not eliminated by depriving the agreement of any legal efficacy without any need of also legislating against its moral suasion. In the circumstances this single fleeting statement is too uninformative to form a reliable basis for pivotal judgment.

⁴ Frankfurter, Some Reflections On The Reading of Statutes, 47 Col. L.Rev. 527, 543.

nullify the legal efficacy of the agreement without distorting the words "to enter into" an agreement to mean reaffirmation, maintenance, performance or enforcement of an agreement.⁵ To borrow from what Judge Learned Hand said in another context, when the statutory words do not embrace the conduct sought to be condemned, it will not do to "search for their equivalent in that circumambient aura, so often euphemistically described as 'the policy of the statute.'" McComb v. Scerbo, 177 F. 2d 137, 141 (C.A. 2).

⁵ Three arguments of the Board may be briefly noted. (1) The Board says that if "to enter into" an agreement means only that then there is hardly any point to the prohibition (Br. p. 21). But removal of the subject of hot cargo from the trading area of the bargaining table is scarcely an inconsiderable achievement. (2) The Board says that if "to enter into" an agreement means only that then arguably the Board cannot order desistance from maintaining and enforcing an agreement which has been invalidly executed (Br. p. 15). But this is a complete non-sequitur. Upon a proper finding of invalid execution obviously expungement of the offensive provision can be required and desistance from giving effect to it ordered. N.L.R.B. v. Local 294, Teamsters Union, 298 F.2d 105, 108 (C.A. 2). (3) The Board says that if "to enter into" an agreement means only that then its power to reach that act is limited by the requirement that an unfair labor practice charge be filed within six months of the event (Br. pp. 15-16). If the period of limitations prescribed by Congress is too short the Board's quarrel is with Congress. The Board is not free to distort the limitations provision or any other provision to which it relates because it dislikes the consequence of the repose which Congress has decreed. Local Lodge No. 1424 v. N.L.R.B., 362 U.S. 411, 428-429. Nor is there merit to the Board's apparent contention that, because maintenance in effect of a union security agreement invalid on its face may be attacked as an unfair labor practice although more than six months have transpired since entry into it without a charge having been filed, parity requires that the same be true of a hot cargo agreement (Br. pp. 16-18). To say this is to say that section 8(e) should have been written in the same way as section 8(a)(3). But the fact is that they are different and it is hardly cogent to argue that provisions which are different should be construed as if they were the same. (Incidentally, in its discussion of Local Lodge No. 1424 v. N.L.R.B., *supra*, the Board imputes to us a contention we never made (Br. pp. 16-18). We used that case as simply another illustration of conscious differentiation in this statute between entry into an agreement, on the one hand, and observance, performance or enforcement of it, on the other (Pet. br. pp. 12-13)).

II. THE OBJECT OF REQUIRING THAT THE PERSONS
TO WHOM WORK IS SUBCONTRACTED SHALL
BE APPROVED BY THE UNION OR OPERATE
UNDER A CONTRACT WITH IT IS TO ASSURE
THAT THE WORK WILL BE PERFORMED
UNDER COMMENSURATE LABOR STANDARDS

In its decision the Board reserved the question whether an agreement confiding the performance of defined work exclusively to the employees covered by the agreement is prohibited by section 8(e). The Board now agrees that such an agreement is legal. It states that, "To the extent that a particular clause in a contract is basically intended to preserve the work opportunities of employees in the unit covered by the contract, then the clause must be viewed as primary in nature and therefore outside the scope of section 8(e), even though an incidental effect of the clause may be to limit the employer's freedom to do business with other employers." (Br. p. 25).⁶

Having relinquished its original reservation, the Board now attempts to substitute another in its place. It recognizes the force in logic and economic reality of the proposition that, granted the validity of an agreement confiding the performance of defined work exclusively to the employees covered by it, preservation of the work and standards established by the agreement requires that, if the absolute prohibition is to be modified to permit subcontracting, the work shall be let only to persons who operate under labor standards commensurate with the contractor's. Thus, the Board states that, "it can be argued that such a clause is lawful because, despite the fact that it relates to the employment conditions of another employer, it has a direct bearing on preserving work for the unit employees" (Br. p. 33). It nevertheless asserts that in this case "it is not necessary to resolve this issue, i.e., to determine whether a work standards limitation in some or all circumstances may be lawful" (Br. p. 33), for, it claims, "the clause here is plainly not a work standards clause" (Br. p. 35).

⁶ See also, Coulon v. Carey Cadillac Renting Co., 50 LRRM 2888 (S.D.N.Y., Aug. 2, 1962).

The Board is plainly wrong. The precise reason for confining the class of persons to whom work may be subcontracted to those who operate under a contract with the union or are approved by it is to guarantee that the work will be performed under commensurate labor standards. The Board's error is revealed by its misreading of this Court's decision in Retail Clerks Union Local 770 v. N.L.R.B., 111 App. D.C. 246, 296 F. 2d 368. The Board states that, "although the Court in that case suggested that a work standards clause might constitute a legitimate attempt 'to remove the economic incentive for contracting out, and thus to preserve the work for the contracting employees,' there is nothing in the Court's opinion to suggest that a limitation on subcontracting based on whether the company has a contract with the union should be construed as having a work-preservation purpose" (Br. p. 34). But this is precisely what this Court did suggest when it remanded the case to the Board, for the clause at issue in that case, just as the clause in this case, did limit subcontracting to employers under contract with the union. As in Retail Clerks, so here, the "clause indicates quite clearly that the employers may subcontract work . . . to another employer if the latter has an agreement with this Union." 296 F. 2d at 370. Thus the clause in Retail Clerks reads that (296 F. 2d at 369-370):

The Employers shall not subcontract any work ordinarily performed by retail clerks in the stores or markets of the Employers, and, further, any future work created by the Employer within the Employer's stores or markets which would ordinarily be performed by retail clerks, shall be performed only by members of the bargaining unit as herein set forth, except that such work may be subcontracted to an employer who is a signatory to an Agreement with the Union. [Emphasis supplied.]

Far from this Court having "recognized that conditioning subcontracting on whether the subcontractor had a contract with the union was plainly unlawful" (Br. p. 28), this Court recognized the likelihood of just the opposite when it linked the "except" clause with maintenance of commensurate labor standards and remanded the case to the Board for consideration in

that light. And the "except" clause limiting subcontracting "to an employer who is a signatory to an Agreement with the Union" is no different from the clause in this case limiting it to those "having contracts with District No. 9, International Association of Machinists." ⁷

The agreements in this case and in Retail Clerks exemplify a typical means of safeguarding the work and standards established by the agreement from the risk of erosion resulting from modification of an absolute prohibition against contracting out. "To protect contract standards, the more common limitations that were found required subcontractors to have a union contract and to pay prevailing area wages." Subcontracting Clauses in Major Collective Bargaining Agreements, Bull. No. 1304, Bur. Lab. Stat., Dept. of Lab., 13 (1961). "The approach used . . . in protecting union standards . . . found in 37 agreements . . . required subcontractors to be under union contract either with the same local, or another local of the same international union, or with an AFL-CIO affiliate." Id. at 15. "In other clauses, union approval was necessary only if the subcontractor was nonunion, in which case the union made sure that the subcontractor was not undercutting contract standards." Id. at 14.

It is regrettable that the Board should in disregard of industrial usage fail to acknowledge or perhaps understand that a limitation upon subcontracting to those under contract with the union or approved by it is in purpose and effect a guarantee of the performance of the work under commensurate labor standards. It is wide of the mark to suggest that a contract with the union may not in fact restrict subcontracting to persons

⁷ Equally baseless is the Board's reliance on this Court's decision in Local 636, United Association v. N.L.R.B., 108 App. D.C. 24, 278 F. 2d 858 (Br. pp. 27, 30). Involved in that case is a typical product boycott situation. Pipefitters represented by one union refused to handle pipe because it had been fabricated by employees represented by another union. This situation is identical with that considered and differentiated in our brief at pp. 46-47. As this Court stated in Retail Clerks, questions presented by clauses of the kind in Retail Clerks and in this case "cannot be fitted into molds designed for cases involving refusals to handle goods." 296 F. 2d at 372.

who "actually have working conditions commensurate with those of the contracting employers" (Br. p. 34). Unions are not accustomed to agree to nonuniform terms among different employers operating within the same competitive area. Cf., Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-504. This is especially evident in this case where the agreement was standard in form (J.A. 23), negotiated with an employer association (J.A. 18), and plainly designed as the uniform agreement in the automotive maintenance field within the territory of the Union's jurisdiction. Nor is the suggestion better taken that the requirement of approval by the Union empowers it to withhold approval for reasons other than maintenance of commensurate labor standards (Br. p. 35). It is truly time for the Board to take to heart the admonition that, in construing agreements, "We cannot assume that a union conducts its operations in violation of law. . . ." Local 357, Teamsters Union v. N.L.R.B., 365 U.S. 667, 676. " 'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.' " N.L.R.B. v. News Syndicate Co., Inc., 365 U.S. 695, 699-700.

The Board therefore cannot elide the issue by treating the agreement in this case as one not designed to assure the performance of subcontracted work under commensurate labor standards. On this issue the Board makes no presentation at all. It concedes the validity of the first branch of our argument (Pet. br. pp. 21-41), and declines to contest the validity of the second branch of our argument (Pet. br. pp. 41-55). The Board's beguiling notion that the absolute prohibition against contracting out work is at the legal end of the spectrum and the product boycott at the illegal end, with intermediate clauses ranging between the extremes, is no analysis (Br. pp. 25-26). The absolute prohibition and adjunct clauses designed to safeguard its modification are not within the spectrum at all.

They are outside the class of agreements to which section 8(e) relates.⁸ And even if the Board's metaphor were apt, nothing in its discussion, either in its decision or brief, provides any rationale or identification of determinants by which to know or test at what point in the spectrum legality and illegality divide.⁹ In any event, whether viewed as part of a spectrum or outside its range, the key to the legality of a clause that requires the performance of subcontracted work under commensurate labor standards is clear and simple. An absolute prohibition against contracting out work maximizes the union's interest in employment security and absolute freedom to contract out maximizes the employer's interest in flexibility. Instead of either side insisting upon the maximum, they compromise the employer's interest in flexibility and the union's interest in preserving the contractually-established work and standards from undercutting by requiring that, if work is to be let, it shall be contracted out only to persons maintaining commensurate labor standards. It being concededly legal to contract for the absolute prohibition, it cannot

⁸ The Board appears to argue that the proviso pertaining to the construction industry is explicable only as it serves to validate such adjunct clauses (Br. pp. 31-32). A single illustration shows the error of this statement. Suppose an agreement between a plumbing contractor and a plumbers union providing that plumbers will not be required to work on any job site where the electrical work has not been subcontracted to an electrical contractor operating under an agreement with a union. See Cuneo v. Essex County District Council, 50 LRRM 2979 (D.N.J. August 16, 1962). This is not a clause auxiliary to maintaining the work and standards of the plumbers since under no circumstances would they be doing electrical work. But the clause is valid because it is within the protective scope of the proviso. The construction proviso therefore clearly has an independent reason for being which negates the claim that it is explicable only to validate clauses which are adjuncts of the modification of an absolute prohibition against contracting out work otherwise to be performed by the employees covered by the agreement. The Board appears to concede that this is so with respect to the apparel and clothing proviso to section 8(e) (Br. pp. 31-32).

⁹ See Friendly, The Federal Administrative Agencies: The Need For Better Definition Of Standards, 75 Harv. L. Rev. 863 (1962).

be illegal to contract for a compromise which reconciles the two interests so that each may be served compatibly with the other.¹⁰

Respectfully submitted,

PLATO E. PAPPS

LOUIS P. POULTON

1300 Connecticut Avenue, N.W.
Washington 6, D. C.

BERNARD DUNAU

912 Dupont Circle Building, N.W.
Washington 6, D. C.

Attorneys for Petitioner

September, 1962

¹⁰ We do not suppose it is greatly important but throughout its brief the Board attributes to us the use of the words "something less" (Br. pp. 27, 28, 30, 32). We have reread our brief and do not find that we used the quoted words anywhere in it. Precisely what we said is that subcontracting control of the kind in this case "is a lesser included part of the absolute prohibition and consistent in purpose with it" (Br. pp. 8, 21, 42). On that proposition we are willing to stand as a matter of logic and economic reality.

